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**A Constructivist Approach to International Crimes and
Application of Universal Jurisdiction and Immunity of Officials
in Respect of International Crimes**

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Doctor of Philosophy

Durham Law School



2016

Abstract

This thesis analyses the application of rules of immunity and universal jurisdiction in respect of international crimes by adopting a constructivist approach to the interests of the international community and formation of customary international law. Accordingly, the study proposes an alternative understanding of customary international law in order to analyse the rules of immunity, universal jurisdiction and international crimes and their interrelated operations. The operation of the rules of immunity and universal jurisdiction regarding international crimes is conducted on the basis of a constructivist understanding of the interests of the international community to determine whether legitimate rules can be institutionalised in customary international law as well as rules based on the self-interests of States. This thesis also considers whether rules, based on their legitimacy, can comprise different legal implications in international law. In this context, the study considers how international crimes, which give rise to the dual responsibility for States and their nationals, are created by adopting a constructivist approach to customary law formation. This study further considers whether international crimes in international law are based on legitimacy rather than the self-interests of States, and whether they can give rise to different legal implications, specifically with regard to rules of universal jurisdiction and the immunity of officials. The development and application of the rules of jurisdiction and immunity are considered separately in international law on the basis of their development in customary international law. This study seeks to determine the appropriate general approach to the rules of jurisdiction by analysing both the permissive and prohibitive approaches to the rules of jurisdiction. In addition, it also explores whether functional immunity can be assimilated with the immunity of States and examines the role of the rules of attribution in the application of the functional immunity of officials.

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Declaration

Material contained in the thesis has not previously been submitted for a degree in this or any other institution.

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List of Abbreviations

Journals

AJIL	American Journal of International Law
AmJJuris	American Journal of Jurisprudence
AmUInt'l LRev	American University International Law Review
ASIL PROC	American Society of International Law Proceedings
Aust YBIL	Australian Yearbook of International Law
AustrianJPubIntl L	Austrian Journal of Public and International Law
Berk J Intl L	Berkeley Journal of International Law
BUIntlLJ	Boston University International Law Journal
BYBIL	British Year Book of International Law
CamRIntl Aff	Cambridge Review of International Affairs
CapULRev	Capital University Law Review
Chinese JIL	Chinese Journal of International Law
Chin Yrbk Intl l & Aff	Chinese (Taiwan) Yearbook of International Law and Affairs
CLR	California Law Review
ColumJTransnat'l L	Columbia Journal of Transnational Law
DenvJInt'l L& Pol'y	Denver Journal of International Law and Policy
Duke LJ	Duke Law Journal
Duke JComp& Int'l L	Duke Journal of Comparative and International Law
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
EJIntl R	European Journal of International Relations
Fordham Int'l LJ	Fordham International Law Journal
GaJInt'l& CompL	Georgia Journal of International and Comparative Law
GermLJ	German Law Journal
Germ Yrbk Intl L	German Yearbook of International Law

GeoInt'l Env'tlLRev	Georgetown International Environmental Law Review
GeoJIntl L	Georgetown Journal of International Law
HarvInt'l LJ	Harvard International Law Journal
HarvLRev	Harvard Law Review
HeidelbergJIntlL	Heidelberg Journal of International Law
Human Rights Rev	Human Rights Review
HumRtsQ	Human Rights Quarterly
ILSA JIntl& CompL	ILSA Journal of International and Comparative Law
Indian J Intl L	Indian Journal of International Law
Int'l Org	International Organization
IntlSec	International Security
ILQ	International Law Quarterly
ISQ	International Studies Quarterly
JConflict Resol	Journal of Conflict Resolution
JICJ	Journal of International Criminal Justice
JPol&IntlStud	Journal of Politics and International Studies
J Theory Soc Behav	Journal for the Theory of Social Behaviour
L& Pol'y	Law and Policy
LCP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
LaLRev	Louisiana Law Review
Maryland JIntl L	Maryland Journal of International Law
Maryland JInt'l L& Trade	Maryland Journal of International Law and Trade
Max Planck Yrbk UN L	Max Planck Yearbook of United Nations Law
McGill LJ	McGill Law Journal
MichJInt'l L	Michigan Journal of International Law
MLR	Modern Law Review

New EngLRev	New England Law Review
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
NZYIL	New Zealand Yearbook of International Law
MelbJIntlL	Melbourne Journal of International Law
MillennJIntlStud	Millennium Journal of International Studies
RevInt'l Stud	Review of International Studies
RIntl L& Pol	Review of International Law and Politics
San Diego Intl LJ	San Diego International Law Journal
SupCtRev	Supreme Court Review
StanLRev	Stanford Law Review
SwJL& Trade Am	Southwestern Journal of Law and Trade in the Americas
SwissRIntl & EL	Swiss Review of International and European Law
TennLRev	Tennessee Law Review
TexInt'l LJ	Texas International Law Journal
TexLRev	Texas Law Review
TulsaLRev	Tulsa Law Review
VaJInt'l L	Virginia Journal of International Law
VandJTransnat'l L	Vanderbilt Journal of Transnational Law
WashLRev	Washington Law Review
WisInt'l LJ	Wisconsin International Law Journal
WldPol	World Politics
Yale JInt'l L	Yale Journal of International Law
YaleHumRts& DevLJ	Yale Human Rights and Development Law Journal
YaleLJ	Yale Law Journal
YIHL	Yearbook of International Humanitarian Law

Other abbreviations

AU	African Union
ICC	International Criminal Court
ICTY	International Criminal Tribunal for Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
SCSC	Special Court for Sierra Leone
UNCH	United Nations Charter
UNCJIS	The United Nations Convention on Jurisdictional Immunities of States and Their Property
UNGA	United Nations General Assembly
UNICC	Negotiated Relationship Agreement between the International Criminal Court and the United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

Introduction

Research Aims and Objectives

Adopting a constructivist approach to the formation of customary international law and the interests of the international community, this thesis examines the development and operation of the rules of jurisdiction, immunity and international crimes independently and conjointly. In particular, the thesis delineates the circumstances in which States can exercise universal jurisdiction over foreign officials for violations of international crimes on the basis of international law. In embracing a constructivist approach to the formation of customary law, this research examines international crimes, rules of jurisdiction and immunity as an integrated study in light of the social construction of the interests of the international community.

First, the consideration of customary international law is conducted on the basis that the operation of the rules of jurisdiction, immunity of officials, and international crimes are dependent on customary international law.¹ The customary status of the rules of immunity is well established, and a permissive or prohibitive approach to customary international law is generally adopted to the rules of jurisdiction. However, in relation to international crimes, in spite of the fact that international law recognises crimes, there is disagreement over how international crimes are created.² More generally, the difficulties in relation to the methods of identifying international crimes are attributed to the sources of international law and, more specifically, to customary international law.³ Hence, an understanding of customary international law impacts an understanding of the rules of immunity, jurisdiction and international crimes and their interrelated operation. This thesis analyses theories of custom

¹ *Arrest Warrant of 11 April 2000 (Congo v Belgium)* [2002] ICJ Rep 3 [58]; *Case of SS 'Lotus' (France v Turkey)* [1927] PCIJ Ser A No 10 18–22; Rosanne van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules' (2013) 26 LJIL 559: that rules of immunity of officials have mainly developed in national courts; Antonio Cassese, *International Criminal Law* (OUP 2003) 23–25.

² Cassese (n 1) 23–25.

³ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 400–5.

formation based on the bifurcation of acts as binding *usus* and *opinio juris* and approaches which place emphasis on the consent of States in the formation of customary law.

Secondly, the thesis focuses on the social construction of States' interests and the interests of the international community to determine whether the rules of customary international law can comprise only rules based on the self-interests of States or that customary rules can also include rules based on their legitimacy. In this context, it considers whether the legitimacy of the rule can affect its legal consequences in international law. This is done on the basis that the rules of immunity and jurisdiction and international crimes have been associated with the interests of the international community. International crimes have often been associated with non-legal lexical terms, which are intended to convey their perceived importance (eg *hostis humanis generis*,⁴ heinous acts,⁵ attacks on the international legal order,⁶ and so on⁷). Further, the existence of a right or duty for States to exercise universal jurisdiction has also often been associated with the interests of the international community.⁸ In addition, rules of immunity as rules of customary international law have often been associated with their procedural function in determining their interaction with international crimes,⁹ rather than their customary status.

Thirdly, this research seeks to identify whether international law can differentiate between customary laws based on the self-interests of States and those based on their legitimacy. The examination of the creation of the interests of States from a constructivist

⁴ Edwin D Dickinson, 'Is the Crime of Piracy Obsolete?' (1925) 38 HarvLRev 334, 351.

⁵ *Attorney General of the Government of Israel v Adolf Eichmann* (District Court of Jerusalem) (1961) 39 ILR 5 [11(b), 12(a)].

⁶ *Regina v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* (House of Lords) (24 March 1999) [2000] 1 AC 147, 119 ILR 136, Lord Millet 275.

⁷ See also Georges Abi-Saab, 'The Proper Role of Universal Jurisdiction' (2003) 1 JICJ 596, 598.

⁸ Mary Robinson, *The Princeton Principles on Universal Jurisdiction* (Princeton University 2001) 23.

⁹ *Arrest Warrant* (n 1) [60]; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99 [58,93]; (2001) 34 EHHR 11 Joint Dissenting Opinion [3].

perspective and the appraisal of the formation of customary international law can illustrate the distinctions and similarities between the legitimacy and legality of the rules. More specifically, it can clarify the legal status and operation of legitimate rules in international law and considers the criteria for the identification of legitimate rules which have developed in customary international law. Accordingly, this study probes the concepts of *erga omnes* obligation and *jus cogens* norms as they are also widely acknowledged to be linked to the interests of the international community and their operation vis-à-vis customary international law. With respect to *erga omnes* obligations, this thesis assesses whether the concept of *erga omnes* obligations embodies the legal criteria for the identification of some rules of customary international law which are perceived as legitimate (ie include the normative convictions of the international community). Against this background, the thesis deliberates whether international crimes could give rise to obligations *erga omnes*.

Fourthly, this thesis considers the general application of customary international law to the rules of jurisdiction and places the rules of immunity and non-intervention in the context of the rules of jurisdiction. From this perspective, it reviews whether States can exercise universal jurisdiction on the basis of violations of international crimes and proposes the conditions accompanying the exercise of universal jurisdiction in international law. This is done by considering international crimes in the context of the interests of the international community, which are perceived as legitimate by States. Application of both the rules of jurisdiction and immunity of officials in relation to international crimes is conducted in light of the fact that States are the primary subjects of international law. This is taken into consideration in the following ways: first, the constructivist approach adopted in this thesis recognises States as the primary actors in the social structure of the State system.¹⁰ Secondly, the definition of international crimes adopted in this thesis recognises the obligations of States,

¹⁰ Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 9.

as well as those of individuals. Finally, it studies the rules of immunity and jurisdiction in light of States' rights and obligations under international law.

Fifthly, this thesis examines whether the functional immunity of officials and States can be distinguished from the perspective of customary international law, as well as the rules of personal immunity of high-ranking officials in respect of their status. This is done to understand the operation of the rules of the functional immunity of officials, and the personal immunity of high-ranking officials, in respect of international crimes. Thus, from the perspective of the interests of the international community and their link to customary rules, this thesis considers if a better explanation of the operation of rules of immunity of officials in respect of international crimes can be provided than the explanations based on *jus cogens* and the substantive or procedural nature of the rules of immunity.

Sixthly, on the basis of a constructivist approach to customary international law and the interests of the international community, this thesis offers clear-cut answers to the rights and obligations of States in respect of the exercise of universal jurisdiction for violations of international crimes by foreign officials and individuals. This is done from both ends. It includes the rights and obligations of the State seeking to exercise universal jurisdiction for violations of international crime and the State whose officials or nationals will be implicated as a result of the exercise of jurisdiction by a foreign State. The study of the operation of the rules of jurisdiction and immunity is also significant in terms of understanding their development in respect of international crimes.

Finally, the reference to international crimes which are generated in customary international law in this thesis is limited on the basis of a few criteria. First, the definition of international crimes is limited to the duty of States to prevent the commission of the crimes and prosecute the alleged offenders under international law. Secondly, the definition of international crimes is further limited to the existence of individual responsibility in the

domestic legal systems of States rather than only individual responsibility on the international level. Thirdly, the definition of crimes proposed here is not based on the gravity or systematicity of the offences. Finally, the creation of international crimes in customary law is considered in light of the binding *usus* proposed in this thesis on the basis of a constructivist understanding. Accordingly, unless otherwise stated, when a reference is made in this thesis to a crime as an international crime it is an international crime in customary international law based on the conditions above.

Significance and Contribution of This Thesis

This study makes an original contribution to the study of international crimes and the application of universal jurisdiction and rules of immunity in several perspectives. First, notwithstanding the fact that there is a plethora of references to the interests of the international community in the legal authorities in relation to international crimes, a social construction of the “interests approach” has not been applied to studying international crimes and their application to the rules of jurisdiction and immunity. The study of the construction of interests of the international community can clarify the legal consequences of these rules in international law, and thus provides a basis to understand the legitimacy of norms. This illuminates the differences between the legality and legitimacy of the rules, and whether there can be an overlap between the rules based on their legality and legitimacy. International crimes could, therefore, be examined from both legitimacy and legality perspectives and applied to the rules of jurisdiction and immunity on that basis.

The appraisal of customary law from a constructivist perspective provides an alternative way of understanding how customary law is created in international law and, accordingly, institutes a framework by which to study the creation of international crimes. Moreover, probing the interaction between international crimes and the rules of immunity from the perspective that they both have the same status in international law as rules of customary

international law and their connection to interests of the international community, delivers an alternative interpretation to the following generally acknowledged assumptions. It questions the relevance of the procedural nature of the rules of immunity in the interaction of the rules of immunity with other rules of customary international law such as international crimes.¹¹ Further, it questions a reliance on *jus cogens* explanations to understand the relationship between international crimes and the rules of immunity.¹²

Thirdly, despite the fact that the link between the rules of jurisdiction and immunity is widely acknowledged in the legal authorities,¹³ the study of international crimes in respect of the rules of jurisdiction and immunity are generally conducted in isolation of each other.¹⁴ This thesis seeks to overcome this shortcoming and examines both the rules of immunity and jurisdiction in relation to international crimes as an integrated study. The thesis considers the rules of jurisdiction in the context of the rules of immunity of officials and, in so doing, seeks to garner a deeper analysis of the rules of jurisdiction and immunity. Thus, this research defines how international crimes are created, and their application to the rules of jurisdiction and immunity.

Fourthly, studies on universal jurisdiction and the immunity of officials for violations of international crimes have generally focused on the State vis-à-vis the individual and have not generally considered the consequences of officials' rights and obligations in the context of the obligations of the State with a closer link to the offence or the offender in international

¹¹ *Jurisdictional Immunities of the State* (n 9) [58, 93]; *Prefecture of Voioitia v Federal Republic of Germany (Distomo Massacre case)* (Court of Cassation) (2000) 129 ILR 514.

¹² *Pinochet (No 3)* (n 6) Lord Hutton 261-64, Lord Hope 242-46, Lord Millet 275-78; Paola Gaeta, 'Official Capacity and Immunities' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 982; Alberto-Luis Zuppi, 'Immunity v Universal Jurisdiction: The *Yerodia Ndombasi* Decision of the International Court of Justice' (2002) 63 LaLRev 309, 323; Curtis A Bradley and Laurence R Helfer, 'International Law and the US Common Law of Foreign Official Immunity' (2010) 2010 SupCtRev 213, 238.

¹³ ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat' (31 March 2008) A/CN.4/596 para 14; *Arrest Warrant* (n 1) [46].

¹⁴ See generally Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008); Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003).

law.¹⁵ This concerns whether the obligations of States under international law affect the immunity of their officials or the legality of the existence of universal jurisdiction by foreign States. The assertion that States are primary subjects of international law is uncontroversial, but this assertion should be viewed in light of the fact that some scholars writing on international crimes and universal jurisdiction or the immunity of officials generally only refer to individual responsibility in respect of international crimes, and overlook the fact that, first and foremost, the legal obligations and rights of States vis-à-vis other States should be considered in relation to both the rules of jurisdiction and immunity.¹⁶

Structure of the Research

This thesis comprises five chapters and adopts the following structure. Chapter One argues that there is an international community based on shared interests and obligations owed to all members of the community. This chapter contends that the interests of the States are socially constructed and that the interests of the community of States, from a legal perspective, are those which have been internalised by most States and have also been institutionalised in international law. These include interests which are either based on the self-interests of States or are perceived as legitimate. The legitimacy of norms is considered from the internalisation aspect of norms in the social structure of the State system, rather than their legal status. The level of internalisation of a norm does not necessarily affect its legal consequences once it is institutionalised in international law. On that basis, it is suggested that, one cannot differentiate between norms which are institutionalised in international law on the basis of self-interests or legitimacy (for example, the rules of jurisdiction, immunities and international crimes) provided that they have the same legal status in international law (eg customary international

¹⁵ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 243; Zachary Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 BYBIL 281, 324; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law* (Intersentia 2005); Reydams (n 14).

¹⁶ Alebeek (n 15) 243; Douglas (n 15) 324.

law).

Chapter 2 identifies international crimes by analysing the formation of custom in international law. This chapter also determines whether the rules of customary international law can enshrine community interests based on the legitimacy of norms as well as the rules on the self-interests of States. This is relevant in terms of the interaction of international crimes with the rules of jurisdiction and immunities in international law. In adopting a constructivist approach, the chapter maintains that custom could be created on the basis of binding *usus* provided that there is consensus in the international community and binding *usus* is determined through a process of socialisation. This chapter also uncovers whether customary international law could give rise to rules which represent the self-interests of States, as well as rules which are perceived as legitimate. It proposes that international crimes are those which give rise to the dual responsibility of States and individuals. It examines whether the rules of customary international law, which are also perceived as legitimate (ie international crimes) could give rise to *erga omnes* obligations. Put together, the results of these discussions are used in this thesis to answer whether foreign courts have jurisdiction over non-nationals who have committed international crimes abroad on non-nationals and, secondly, whether the personal and functional immunities of foreign officials are applicable in respect of international crimes.

Chapter 3 probes whether States are entitled to exercise universal jurisdiction over individuals accused of committing international crimes on the basis that crimes under customary international law give rise to *erga omnes* obligations. This chapter initially analyses the application of the rules of jurisdiction in international law, and subsequently applies the findings to the exercise of universal jurisdiction. It examines both the permissive and probative approach to the rules of jurisdiction. Additionally, the chapter assesses whether the duty of non-intervention and rules of immunity affect the operation of the rules of jurisdiction. It examines the operation of universal jurisdiction based on the prohibitive rules of international

law. The chapter also investigates whether traditional bases of jurisdiction seek to ascertain a balance between the rights of the States involved, thereby avoiding breaching the duty of non-intervention. This chapter evaluates the exercise of universal jurisdiction from the perspective that the exercise of universal jurisdiction should not infringe upon the duty of non-intervention in the affairs of other States. Furthermore, some of the risks associated with the exercise of universal jurisdiction by States are considered in the context of proposed conditions for the exercise of universal jurisdiction by States.

Chapter 4 contends that functional immunity is determined based on discerning private from official conduct and prohibitive rules of international law. The chapter examines whether the rules of functional immunity in international law are granted to officials for the benefit of their home State or the officials, or both. On that basis, it studies whether rules of attribution pertaining to State responsibility shape the outcome of the rules of functional immunity of officials. This chapter also assesses whether international crimes, which create dual responsibility for States and individuals, justify withholding the functional immunity of officials for the commission of international crimes. It also inquires as to the relevance of the duty of non-intervention as a prohibitive rule of international law and the individual responsibility of officials in relation to crimes committed in the territory of the forum State.

Chapter 5 examines whether immunity *ratione materiae* is distinct from State immunity (*acta jure imperii/acta jure gestionis*). This chapter also queries whether the immunity of State and high-ranking officials share any similarity in respect of their development in international law. It considers whether an exception to the personal immunity of high-ranking officials in respect of international crimes is emerging in international law and explores whether States can withdraw the personal immunity of foreign officials based on the defence of necessity in international law. The chapter also reflects upon the relationship between international crimes and the rules of immunity from a conflicts of norms perspective. It assesses whether arguments

based on the conflicts of norms can provide a better explanation for the interaction of the rules of immunity and international crimes. Finally, this is examined from the perspective of the interests of the international community and the customary status of rules of immunity and international crimes.

Chapter One: Interests of the International Community

1. Introduction

This chapter contends that there is an international community based on three factors. First, there are shared interests among States which are objectively recognisable rather than being based on a set of pre-determined objectives (Section 2.1). Secondly, a community must not only have shared interests based on the self-interests of States but also shared interests among its members which are perceived as legitimate (Section 2.2). Finally, the existence of obligations owed to all the members of the community is recognised as a precondition for the existence of community (Section 2.3) and that the basis of such obligations in the international community is international law (Section 3.2 and Chapter 2). All of the three elements of the international community can be understood from a constructivist perspective. It is argued that the interests of the international community are socially constructed (Section 3.2) by the mutual constitution of the agent and the social structure of the State system (Section 3.1). This is in comparison with rationalist theories that argue that interests are exogenously determined; rather, by viewing international law from a constructivist perspective, one can determine these interests in international law (Section 3.2).

In addition, the norms institutionalised in international law could be based on self-interests or the legitimacy of the norm (Section 3.2). The level of their internalisation by States does not necessarily affect their legal consequences once they are institutionalised in international law (Chapter 2, Sections 1 and 2). On this basis, one should not differentiate between norms which are institutionalised in international law based on the self-interests of States or the legitimacy (eg rules of jurisdiction, immunities and international crimes) of the rules if they have the same legal status in international law (eg customary international law). Chapter Two argues that some customary rules based on legal criteria could give rise to *erga omnes* obligations which are also norms which have been fully internalised by most States

(Chapter 2, Section 3.3-3.5).

It is maintained that legal interests of the international community are norms which have been internalised by most States and have also been institutionalised in international law (Section 3.1). It is proposed that institutionalisation of norms in international law can expedite the internalisation of norms by States due to the influence of the social structure of the State system on States' interests (Section 3.1). The role of shared understanding/culture/legal discourse in the State system social structure (Section 3.1) is considered in Chapter Two in the discussion of ascertainment of binding *usus*. Chapter Two discusses how the creation of customary law – as a legal discourse and as a subset of the social structure of the State system – both constitutes State interests and behaviour and is influenced by State behaviour and interests (Chapter 2, Section 2). Chapter Two argues that customary law is created by binding *usus* (actions of State which enshrine State interests) and is determined through discursive practices in the international community in the form of legal discourse.

2. International Community (Society of States)

2.1. Community and Shared Interests (Objective or Subjective Interests)

Heeren defined the State system as the union of States ‘resembling each other in their manners, religion and degree of social improvement, cemented together by *reciprocity of interests*’.¹ Bull defines a society of States as a group of States conscious of certain common interests and values ‘in the sense that they perceive themselves to be bound by a common set of rules in their relations with each other and share in the working of common institutions’.² The feature, which ‘distinguishes a “community” from its components is a “higher unity”, as it were, the representation and prioritisation of common interests as against the egoistic

¹ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Palgrave Macmillan 2002) 12; Arnold Hermann Ludwig Heeren, *A Manual of the History of the Political System of Europe and Its Colonies* (David Alphonso Talboys tr, HG Bohn 1846) vii–viii.

² Hedley Bull (n 1) 13.

interests of individual' States.³ Thus, a community must contain a sense of shared interests (reciprocity of interests) among its members.

The idea that the shared interests are subjective or objective is, however, contentious. Koskenniemi identifies three approaches to the concept of community which are widely representative of the legal literature on the issue of community. The first model is the approach which sees 'the pre-legal world already vested with a normative project (a high law, natural reason, etc.) which it is the task of law to express and enforce'.⁴ Secondly, there are those who 'aim to combat national egoism by referring to the factual – political, economic, cultural or ecological – interdependence between States'.⁵ In this approach, if there is a normative order in the community, it is maintained solely because of the needs of interdependence. The third approach is based 'on arguments concerning universality of human nature, culture, socio-economic deep structure or interests'.⁶

Koskenniemi criticises these three approaches of the notion of community on the basis that these values appear subjective, ie there is no immediate perception of what human nature is⁷ (as these three are based on values, interests and nature). Secondly, no such common interests seem to exist, which could be distinguished from the interests of individual States. Thirdly, the fact that all of these three approaches occupy a normative perspective⁸ and do not reflect the States' wishes, interests and will (the "concreteness") of States.

If it is held that the interests of the international community are based on a set of pre-determined criteria, the aforementioned criticisms are justified. These notions of interests are

³ Bruno Simma, *From Bilateralism to Community Interest in International Law* (Brill Nijhoff 1994) 245.

⁴ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 477.

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid* 479.

⁸ *ibid* 478.

subjective in the sense that they are open to interpretation, depending on the values of the interpreter and his or her views on the international community. Secondly, the State as an entity, which is the primary subject of the international community, does not have a dominant role in the creation of these interests or values. Only in the second and third models is the role of States in generating these shared interests acknowledged, but to the extent that pre-determined values are shared by States. On that basis, as Koskenniemi has stated, it would not be incorrect to hold the view that subjectivity ‘tends to degenerate into an outright harmful totalitarianism: who prevents the communitarian myth from turning into a negative utopia?’.⁹

Franck referred to the State system as a community in which rules are deployed to achieve order and promote such societal goals as trade, environmental protection, health, economic development, communications and the peaceful enjoyment of the fruits of labour (secular goals may also attain notions of justice), and community refers to a system of multilateral reciprocal interaction which is capable of validating its members, its institutions, and its rules.¹⁰ The objectives to which Franck referred could be read as subjective aims which are shared by the members of the international community due to the wide spectrum of social, political and economic objectives they include.

Koskenniemi posits that if no one can know these interests in an objective way, there is no justification to claim that the law should impose them on States.¹¹ Thus, the question arises whether, if we accept “shared interests” as a requirement of the a community, we can identify objectively the interests of the international community which are subjectively recognised by its members. On that basis, if the view of the international community is based on the promulgation of interests and preferences recognised by States in international law, rather than natural principles or a pre-determined set of objectives, the aforementioned

⁹ *ibid* 480.

¹⁰ Thomas M Franck, *The Power of Legitimacy Among Nations*, vol 3 (OUP 1990) 51.

¹¹ Koskenniemi (n 4) 481.

criticisms of the international community become irrelevant. These could be common values which have been promulgated in international law on the basis of either the self-interest of States or legitimacy of the norm. This approach does not delve into the intentions of States to adhere to a shared norm (eg based on self-interests or perception of legitimacy of the norm) but accepts that if shared interests can be institutionalised in international law, then at least from a legal perspective they comprise the interests of the international community.

Simma maintains that the institutionalisation of norms in international law provides the key to the substance of what is referred to as the international community.¹² Simma has pointed out that community interests are to be viewed as a consensus according to which recognition and ‘respect for fundamental values is not to be left in the free disposition of States individually or *inter se* but is recognised in international law as a matter of concern to all States’.¹³ In another word, the notion of community becomes inextricably attached to the existence of international law.¹⁴ Thus, if it is held that international law has the capacity to comprise the common interests of States, this should settle the question of the existence of an international community of States. International law would by definition be subject to the objective identification of rules (in that case interests).

Moreover, the mere existence of international law demonstrates that States have institutionalised at least some of their common values or interests, as, without the basis of cooperation and coordination, which could be viewed as a shared value, there would be no need for international law, as egoistic States, each totally having sets of different agendas, let the distribution of power settle their disputes. There must be at least a minimum set of interests, even if they are derivative solely from materialistic objectives, to bring about a framework

¹² Simma (n 3) 256–58; Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of New Century* (Brill Nijhoff 1999) 79.

¹³ Simma (n 3) 233.

¹⁴ Koskenniemi (n 4) 476.

within which the social needs of the community are transformed to legal obligations and rights.

Dworkin not only linked the existence of a community to the existence of shared interests based on shared understandings but also that its law must adhere to the principle of the integrity of law. Dworkin, considering the definition of “community” within the State level, postulated that there are two general models of community (models of political associations). The first model of community (the rulebook model) supposes that members of a community accept a general commitment to obey rules established in a certain way that is special to that community (this model accepts a checkerboard compromise).¹⁵ The second model agrees with the first model that the community requires a shared understanding, but it takes a more comprehensive view of what that understanding is.¹⁶ The members of the second model of the community accept ‘that they are governed by common principles, not just by rules hammered out in political compromise’ and accept the “integrity of law” as an ideal of the community.¹⁷ Dworkin did not illustrate how the common principles are made, but the suggestion that there must be a shared understanding with respect to its principles resonates with a constructivist understanding of community. One could, therefore, assume such principles emanate from a shared understanding of the members of the community.

The rationale of the second model of community tends towards equality and subjects must be treated with equal concern according to some coherent conception of what that means.¹⁸ In this context, the integrity of law does not mean consistency in the application of law or the law itself but rather a requirement of a principle justifying inconsistent laws or their application.¹⁹ This could be explained by the principles or rules of international law, which explain the inconsistent laws or their application. For instance, rules of immunity distinguish

¹⁵ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 210.

¹⁶ *ibid* 211.

¹⁷ *ibid*.

¹⁸ *ibid* 213.

¹⁹ *ibid* 219–21.

between an individual and an official who have committed the same crime but exemption of the official from prosecution in certain circumstances is justifiable on the basis of the principle of non-intervention. The principle of non-intervention justifies the checkerboard solution in certain circumstances involving officials.

Moreover, it is contended that international law as a law governing the international community does not need to give effect to all of the social needs or interests of the international community. It is sufficient for the purposes of community that its laws can give effect to common or shared interests based on the shared understanding of the community. Tomuschat posits that some assume for the society of States to be an international community there must be an actor with ‘clear-cut responsibilities in *all* fields requiring international regulation, monitoring and enforcement but this is not intended by the term international community’.²⁰ Tomuschat asserts that these attempts have generally been ‘to translate the common interest perceived from the field of *political rhetoric* to the sphere of *law*’; instead, the ‘litmus test for the fruitfulness of the concept of international community must be whether, impelled by its driving force, rules, procedures and mechanisms have been established with a view to vindicating and enforcing the common interest recognised by all States’.²¹

This chapter illustrates that the interests of States and subsequently the interests of the international community are socially constructed. States’ interests are socially constructed by discourses prevalent in the State system. However, this does not necessarily mean that every shared interest of States, even if held by most States, will be considered as the interest of the international community in a legal sense. International law provides an avenue for the common interests of States to be institutionalised in international law (eg rules of immunity and diplomatic protection), but it does not guarantee that *all* shared interests will gain the status of

²⁰ Tomuschat (n 12) 78 emphasis added.

²¹ *ibid* 78–9 emphasis added.

law. The institutionalisation of interests of the international community in international law is discussed in Chapter Two.

This reading of the community requires that international law must only have the *capacity* as a law regulating the relations of States in the international community to institutionalise interests of States. This reading does not require the same procedures and mechanisms associated with domestic legal systems to be present in international law. It does not require a replica of domestic institutions at the State system level. The interests, which are predominant in the State system and upheld by most States, have the capacity to be institutionalised in international law. In this vein, interests of the international community are akin to a common denominator of what States subjectively recognise as the interests of the international community²² which are crystallised in international law. These interests could be based on the self-interests of States or legitimacy of norms.

2.2. Community and Normative Considerations

The idea of ‘normative phenomena – rules, norms, conventions, prescriptions and standards of correctness, is one of the most central premises of communitarian epistemology’.²³ In other words, socially isolated entities ‘are unable to generate normative phenomena on their own’.²⁴ Franck maintained that ‘a community is based on a common, conscious system of reciprocity operating among its constituents and it is this system of reciprocity which makes fairness-dialogue possible’ and that ‘the members of a community share not only a system of mutual legal, but also of moral obligations’.²⁵

It has been contended that ‘legitimacy resides in the belief of international society and,

²² Alfred Verdross, ‘*Jus Dispositivum* and *Jus Cogens* in International Law’ (1966) 60 AJIL 55, 574 (see Verdross’ views on ‘ethical minimum’).

²³ Martin Kusch, *Knowledge by Agreement* (OUP 2002) 175.

²⁴ *ibid.*

²⁵ Thomas M Franck, *Fairness in the International Legal and Institutional System* (Brill Nijhoff 1993) 27–8.

as such, reflects the condition of international society at any one time: norms form part of that condition, but do not amount to its total sum'.²⁶ Put differently, 'a community is defined by having a corpus of rules which it deems to be legitimate and by having agreed on a process that legitimates the exercise of authority, one which conduces to the making of fair rules and fair allocations'.²⁷ The members of the community must 'also participate in determining the rule of fairness by which the shares are allocated' and that it 'be a moral community engaged in formulating itself as a rule-community'.²⁸ Equally, 'if it can be demonstrated that the legitimacy of rules and institutions can be measured, that itself constitutes important evidence of community'.²⁹ Community precedes legitimacy; 'it is because States constitute a community that legitimacy has the power to influence their conduct'.³⁰

Similarly, Dworkin asserted that 'we treat community as prior to justice and fairness in the sense that questions of justice and fairness are regarded as questions of what would be fair or just within a particular political group'.³¹ A community of principle 'can claim the authority of a genuine associative community and can therefore claim moral legitimacy –that its collective decisions are matters of obligation and not bare power, in the name of fraternity'.³² When a community is born it follows that notions of procedural and substantive legitimacy gain meaning. This is also evident in Clark's study of the concept of legitimacy.

Clark's study suggests that legitimacy is stripped of any meaning outside a societal framework because legitimacy constitutes international society: 'by studying its principles of international legitimacy – and how in turn these are translated into practice – we demonstrate

²⁶ Ian Clark, *Legitimacy in International Society* (New edn, OUP 2007) 245.

²⁷ Franck, *Fairness in the International Legal and Institutional System* (n 25) 29.

²⁸ *ibid* 29.

²⁹ Franck, *The Power of Legitimacy Among Nations* (n 10) 204.

³⁰ *ibid* 205.

³¹ Dworkin (n 15) 208.

³² *ibid* 214.

that such a society exists'.³³ What is of great importance is that State conduct that 'acts consciously to maintain an international society, defined by its principles of legitimacy and reflects a belief in being bound by such a social enterprise'.³⁴ The existence of that commitment in State conduct precedes the existence of international society.³⁵

International law as a conscious legal order is receptive to the awareness of the common interests of the international community, a community that comprises not only States but also individual human beings.³⁶ To view the concept of law as the command of the sovereign, would make the law distinguishable from normative considerations, and international law in this sense cannot qualify as true law but 'has to be downgraded to a status of international comity, morality, or convenience'.³⁷

Bull maintains that international law is a social process which 'is not a pure process of the application of existing legal rules, but reflects the influence of a variety of actors extraneous to legal rules themselves, such as the social, moral and political outlook of judges, legal advisors and legal scholars'.³⁸ Koh refers to international law as a transnational legal process, which is normative, dynamic and constitutive.³⁹ Law from a constructivist perspective is seen as a 'broad social phenomenon deeply embedded in the practices, beliefs, and traditions of society, and shaped by interactions among societies'.⁴⁰ Under this broader view of law, the

³³ Clark (n 26) 245.

³⁴ *ibid* 247.

³⁵ *ibid*.

³⁶ Koskenniemi (n 4) 23–9.

³⁷ Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, vol 2 (CUP 1991) 187, 186–93 see Kratochwil's critique of Hart and Kelsen.

³⁸ Hedley Bull (n 1) 123.

³⁹ Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *YaleLJ* 2599, 2645–6.

⁴⁰ Martha Finnemore and Stephen J Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 *Int'l Org* 743, 743; see also Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 312.

legalisation of politics ‘encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practice’.⁴¹ There seems to be a shared knowledge among actors (ie mainly States) as to the sources of international law (ie what makes rules binding⁴²) and the rules of international law.

Accordingly, international law must be able to contain not only shared interests but also interests which are perceived as legitimate by the States and produce a belief in its legality (social construct) to assert that international community exists. Tomuschat has contended that the three concepts of *jus cogens*, obligations *erga omnes* and international criminal law ‘operate independently of the actual *will of the parties* involved in a legal relationship’.⁴³ Tomuschat continues that these concepts have ‘a similar background, seeking to strike at conduct which not only constitutes a breach of international norms, but seriously compromises the foundations of a peaceful international order inspired by values of humaneness’.⁴⁴

It must be mentioned that it is not necessary to distinguish between the will of States and States’ responsibility for particular acts to demonstrate that legitimate norms arise in international law. It is merely sufficient to conclude that a community exists if it can be demonstrated that legitimate norms can also be made in international law and create obligations for States and/or individuals. Again, it is the capacity of international law to generate legitimate norms rather than guaranteeing that it will always create legitimate norms.

2.3. Community and Obligations

According to de Visscher, a community exists if there is a sense of the higher good of a universal community, which engenders the idea of law and a sense of legal obligation.⁴⁵ Bull

⁴¹ Finnemore and Toope (n 40) 744.

⁴² *ibid.*

⁴³ Tomuschat (n 12) 81, emphasis added.

⁴⁴ *ibid* 81.

⁴⁵ Charles de Visscher, *Theory and Reality in Public International Law* (Percy Ellwood Corbett tr, Princeton University Press 1968) 89–90.

asserts that there can be no doubt that ‘there are rules which States and other agents in international politics regard as binding on one another’ and it is on this basis that ‘we may speak of the existence of an international society’.⁴⁶ Franck and Dworkin also both argued that certain kinds of obligations and the concept of community are intertwined. Franck held that the international system is a functioning community with a concept of *obligation*⁴⁷ and Dworkin argued that political associations are in themselves pregnant of obligations.⁴⁸ Dworkin held that the obligations of a subject owed to the other members of the community must arise from shared or common principles and its rules must be perceived to be interests of all members equally.⁴⁹

Franck posited that obligation is deeply embedded in the notion of community and although States’ compliance with the rules in the international system may be voluntary, States’ obligations to them are not.⁵⁰ Franck viewed the obligations of States to the international community based on the fact that members of a developed community ‘accept specific reciprocal obligations as a concomitant of membership in that community, which is a structured, continuing association of interacting parties’.⁵¹

In this context, reciprocity is not limited to material exchange, but can also be grounded in the desire to interact and to create sustained relationships,⁵² and the membership of States in the ‘international community carries with it the duty to submit to the existing body of such rules, and the right to contribute to the modification and development in accordance with the

⁴⁶ Hedley Bull (n 1) 124.

⁴⁷ Franck, *The Power of Legitimacy Among Nations* (n 10) 206.

⁴⁸ Dworkin (n 15) 206.

⁴⁹ *ibid* 199–200, 211.

⁵⁰ Franck, *The Power of Legitimacy Among Nations* (n 10) 196.

⁵¹ *ibid* 196–97; Charles Hermann, ‘International Crisis as a Situational Variable’ in James N Rosenau (ed), *International Politics and Foreign Policy: A Reader in Research and Theory* (Free Press 1961) 411.

⁵² Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010) 28.

prevailing rules for such processes'.⁵³ The interactions among States create shared understandings which will become established in rules, and 'if the rules are of a high level legitimacy, they, in turn, will reinforce the tendency to conform to established patterns of behaviour'.⁵⁴

Franck maintained that the belief in obligatory character of rules is 'essential to the existence of an ongoing normative system of relations between sovereign States'⁵⁵ and that the power of (international) law to secure compliance is not, primarily based on enforcement 'but, rather on the general belief of those to whom the law is addressed that they have a stake in the rule of law itself: that the law is binding because it is law'.⁵⁶ Thus, the obligatory character of international law 'emanates from the value States place in law's ability to make interactions predictable'.⁵⁷ This belief in the legality of international law (ie rule of recognition) is a social construct.⁵⁸

These obligations are owed to the international community in the sense they are owed individually to all members of the community. Franck noted that the community obligations of members do not arise out of the terrain of contract; rather, obligations such as obligations *erga omnes* are inherent in the *status*⁵⁹ of members as members of the international community. For instance, Franck held that the obligation to honour treaties (*pacta sunt servanda*) is acquired associatively, not by consent, and is owed generally towards all (*erga omnes*)⁶⁰. Chapter Two discusses the modes of creation of obligations based on interests of the international

⁵³ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 Peace (9th edn, Longman 1992) 14.

⁵⁴ Franck, *The Power of Legitimacy Among Nations* (n 10) 200.

⁵⁵ Brunnée and Toope (n 40) 129.

⁵⁶ Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (1996) 100 AJIL 88, 91.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ Franck, *The Power of Legitimacy Among Nations* (n 10) 200–1.

⁶⁰ *ibid* 202.

community in international law. Chapter Two argues that rules of customary international law can be identified on the basis of consensus among States both in terms of binding *usus* and individual norms and discusses how interests of States may emerge in customary rules. Chapter Two also argues that some customary rules could also give rise to *erga omnes* obligations.

Accordingly, to say that there is an international community, international law must be able to produce not only rules based on shared interests subjectively recognised by States but also rules which are perceived as legitimate and produce a belief in the legality of its rules and produce obligations which are owed to other States. The next section discusses how the interests of the State are created as a result of their statehood in the international community.

3. Cultures and the Social Structure of the State System

3.1. Social Structure of the State System

Studying the social structure of the State system explicates the processes by which the interests of the international community are made. It puts international law in the context of other social phenomena, such as social norms. Studying the social structure of the State system is ‘an alternative way of understanding the relationship between law and its neighbouring discourses, social description and political prescription’.⁶¹ Through such a perspective, we can also study the creation of international law as part of the social structure of the State system and how international law relates to the interests of the international community. This section introduces the concept of constructivism, which is applied in Chapter Two to argue that customary international law is made by binding *usus* (ie State action) by consensus, which is socially constructed. It argues that binding *usus* is determined through the process of socialisation. This is argued on the basis that State interests, which guide State actions, are socially constructed. It also argues that customary rules can comprise the interests of the

⁶¹ Koskenniemi (n 4) 13.

international community. Based on the findings in Chapter Two, it is argued that international crimes are crimes which create responsibility for both States and individuals on the basis of binding *usus* (Chapter 2, Section 2) and represent the interests of the international community.

According to constructivism, the structure of the State system is a social one⁶² and international law is part of this social structure⁶³. The social structure of the State system is constructed on two levels: macro (system level) and micro (desire and belief of individuals).⁶⁴ Constructivism emphasises the role of ideational factors (such as ideas) in constituting social facts (language, religion, beliefs, norms) through social interaction and holds that once social facts are established, they will influence the behaviour of agents.⁶⁵ When an idea (or belief) is shared (ie is inter-subjective) by an agent through social interaction (or social practice⁶⁶) it becomes known as culture or a social fact on that level (ie State level or State system level)⁶⁷ and could take many specific forms: norms, institutions, ideologies, organisations and threat-systems.⁶⁸ Accordingly, standards of behaviour or norms, shared understandings or shared expectations are created through mutual expectations in social settings.

The State system ‘is an “anarchy” in the strict sense because of the lack of a world State but is highly social’; ‘what really determines the behaviour within anarchies is shared expectations and understandings that give specific meaning to material forces’.⁶⁹ In this

⁶² Alexander Wendt, *Social Theory of International Politics* (CUP 1999).

⁶³ Anthony Clark Arend, *Legal Rules and International Society* (OUP 1999) 129; Gerhart Niemeyer, ‘International Law and Social Structure’ (1940) 34 AJIL 588.

⁶⁴ Wendt (n 62) 217.

⁶⁵ David Armstrong and Theo Farrell, *International Law and International Relations* (2nd edn, CUP 2012) 100.

⁶⁶ Ted Hopf, ‘The Promise of Constructivism in International Relations Theory’ (1998) 23 IntlSec 171, 179; Richard K Ashley, ‘Untying the Sovereign State: A Double Reading of the Anarchy Problematique’ (1998) 17 MillennJIntlStud 227, 243; Roxanne Lynn Doty, ‘The Bounds of “Race” in International Relations’ (1993) 22 MillennJIntlStud 443, 454; Arend (n 63) 128.

⁶⁷ Armstrong and Farrell (n 65) 110; Wendt (n 62) 267; Nicholas G Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press 1989).

⁶⁸ Wendt (n 62) 141.

⁶⁹ Ronald L Jepperson, Peter J Katzenstein and Alexander Wendt, ‘Norms, Identity, and Culture in National Security’ in Peter J Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996) 3.

context, the States' perceptions of the States and 'their roles in the world are socially constructed within a dense network of transnational and international social relations'.⁷⁰

Interests are products of social practices that mutually construct actors and structure.⁷¹ State interests are created by 'internationally shared norms and values that structure and give meaning to international life'.⁷² Constructivism accentuates 'a process of interaction between agents and structures and its ontology is based on the mutual constitution of agents and structures'.⁷³ The recognition of this 'mutual constitution is an important contribution to the theory of international relations, because many interesting empirical phenomena in international relations are understandable only by a methodology that avoids assuming a neat separation between agents and structures'.⁷⁴

Shared understandings are simultaneously the product of State action (causal effect) and influence States' interests and acceptable form of behaviour (constitutive effect),⁷⁵ ie the structure of the international system has both a causal and constitutive effect in relation to States and their societies (both top-to-bottom and bottom-to-top effects).⁷⁶ Accordingly, when States claim that they are using force only in self-defence, they cannot avoid reinforcing Articles 2(4) and 51 of the UNCH and *at the same time* are redefining the rules by specifying how they wish the concepts of self-defence and sovereignty to be understood by other States.⁷⁷ For instance, the norm of sovereignty regulates the interactions of States in international affairs and also defines what a State is, and similarly, human rights norms not only protects citizens

⁷⁰ Martha Finnemore, *National Interests in International Society* (Cornell University Press 1996) 2.

⁷¹ Robert O Keohane, 'International Institutions: Two Approaches' (1988) 32 ISQ 379, 390–1.

⁷² Finnemore (n 70) 3.

⁷³ Jeffrey T Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 WldPol 324, 326.

⁷⁴ Ian Hurd, 'Constructivism', *The Oxford Handbook of International Relations* (Oxford Handbooks of Political Science, OUP 2010) 304.

⁷⁵ *ibid.*

⁷⁶ Finnemore (n 70) 13–5; Checkel (n 73) 326.

⁷⁷ Hurd (n 74) 304 emphasis added.

from the State but also defines what a civilised State is (“good people do X”).⁷⁸ This does not mean that norms which constitute identity and the interests of States are not amenable to change; for instance, ‘the content norm of sovereignty has changed dramatically over time, becoming more circumscribed, particularly when it comes to human rights’, but ‘sovereignty still constitutes a State – as opposed to any other corporate actor’.⁷⁹ The content of the norms is dependent on the shared understanding in the social structure of the State system.

Socialisation could be broadly explained as the process through which shared understanding between agents and the social structure begins to emerge. The socialisation process illustrates the effect of the social structure on agents (top-to-bottom). Socialisation refers to ‘the internalisation of, the norms and behavioural patterns of any particular society – members simply absorb what they see around them’⁸⁰ – by which identities and interests get formed, and is in part a process of learning to conform one’s behaviour to societal expectations.⁸¹ State socialisation ‘is grounded in the beliefs, conduct and social relations of individuals’ and relates to the identification of ‘various causal pathways through which global or regional norms are internalised by relevant individuals associated with the State’.⁸²

Wendt argues that the three cultures of anarchy (enemy, rival, and friend) reflect the three degrees in which a norm can be internalised and thus three pathways in which structure

⁷⁸ Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics’ (2000) 54 Int’l Org 1, 5.

⁷⁹ *ibid.*

⁸⁰ Clark (n 26) 173; Wendt (n 62) 250; Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin 1991) 130.

⁸¹ Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP 2013) 50; see also Jeffrey T Checkel, ‘Norms, Institutions, and National Identity in Contemporary Europe’ (1999) 43 ISQ 83, 97–100; Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organisations* (OUP 2011) 493; Kathryn Sikkink and Martha Finnemore, ‘International Norm Dynamics and Political Change’ (1998) 52 Int’l Org 887, 915; Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54 Duke LJ 621, 635; Wendt (n 62) 265–80; Philip E Freedman and Anne Freedman, ‘Political Learning’ in Samuel L Long (ed), *The Handbook of Political Behavior* (Springer 1981) 258.

⁸² Goodman and Jinks, *Socializing States* (n 81) 40; Wendt (n 62) 170.

can be produced.⁸³ Norms internalised to the second degree, are perceived to be in the self-interests of States and norms internalised to the third degree are perceived to be legitimate.⁸⁴ The degree of legitimacy of a norm affects its compliance pull.⁸⁵ Norms will be internalised in various stages which occur on the international and domestic levels separately, but are increasingly linked, and the line between the various stages is not clear-cut.⁸⁶ Hence, objectively looking at the social structure of the State system at any given time, norms are internalised to different degrees by different States until a norm has been completely internalised by most States. The predominant structure of the international system in relation to a norm or set of norms depends on the degree of internationalisation of that norm or norms by most actors.

When ideas or norms are institutionalised at the international level as international norms or set of norms, ie in the form of a treaty or emerging customary rule, this could expedite the process of socialisation and as a consequence those norms are more likely to affect State behaviour and the internalisation of norms.⁸⁷ As they are emerging, or when they have emerged in the social structure of the State system, they could influence the formation of States' interests.⁸⁸ This is on the basis that norms 'structure realms of possibilities and create options that would not have been self-evident in the absence of the norm' and the 'normative discourse

⁸³ Wendt (n 62) 250, 170, ch 6; Goodman and Jinks, *Socializing States* (n 81) 40.

⁸⁴ Wendt (n 62) 250 (degrees of internalisation); Alastair Iain Johnston, 'Treating International Institutions as Social Environments' (2001) 45 ISQ 487, 496.

⁸⁵ Armstrong and Farrell (n 65) 102; Franck, *The Power of Legitimacy Among Nations* (n 10) 38–49.

⁸⁶ Sikkink and Finnemore (n 81) 893, 900, 904 ('norm cascade'); also see Thomas Risse and Stephen C Ropp, *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999) 11–2; Christian Reus-Smit, 'Human Rights and the Social Construction of Sovereignty' (2001) 27 *RevInt'l Stud* 519, 528.

⁸⁷ Sikkink and Finnemore (n 81) 887, 895, 901, 904 and 906 for international legitimization of ideas or norms; Judith Goldstein and Robert O Keohane, *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press 1993).

⁸⁸ Sikkink and Finnemore (n 81) 900–2; Miles Kahler, 'The Causes and Consequences of Legalisation' in Judith Goldstein, Robert O Keohane and Anne-Marie Slaughter (eds), *Legalization and World Politics* (MIT Press 2001).

structures new contexts of the realm of acceptable practice'.⁸⁹ Norms do not 'determine outcomes but makes certain practices acceptable or illegitimate'.⁹⁰

When a norm has been internalised to the second degree or third degree and institutionalised in international law, the constitutive and causal effects of the structure (cultures of "anarchy") of any sets of rules vis-à-vis States should be taken into consideration. That is the reason why institutionalisation in international law may expedite the process of socialisation.⁹¹ In this way, international law, which institutionalises the predominant culture of the State system, affects the culture of States, which could lead to a change of States' interests. International actors – mainly States but including international institutions (IOs and international courts), and NGOs⁹², shape the culture of State system and domestic actors –eg government institutions, groups, and individuals, shape the culture of the domestic level. Both cultures at the domestic level and at the system level continuously impact each other.

The major contribution of constructivism in respect of the mutual constitution of agent and structure can pose a problem for researchers to distinguish at exactly which moment the agent affects the structure and vice versa. It has been maintained elsewhere that if actors constitute the social structure of the State system, 'which in turn constitutes the actor, *ad infinitum*, then how do the original identity and interests develop?'.⁹³ In this context, the main drawback of some constructivism research is that it often fails to 'distinguish adequately between explanatory and outcome variables – often claiming that both variables are mutually constitutive'.⁹⁴ It has been argued that this methodological inconsistency can be resolved 'by

⁸⁹ Richard Price and Nina Tannenwald, 'Norms and Deterrence: The Nuclear and Chemical Weapons Taboos', *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996) 19.

⁹⁰ *ibid*; Sikkink and Finnemore (n 81) 900–2, 908.

⁹¹ Sikkink and Finnemore (n 81) 900–2.

⁹² *ibid* 895–900.

⁹³ Steven Dixon, 'Humanitarian Intervention: A Novel Constructivist Analysis of Norms and Behaviour' (2013) 9 *JPol&IntlStud* 126, 136; Goodman and Jinks, *Socializing States* (n 81) 5.

⁹⁴ Goodman and Jinks, *Socializing States* (n 81) 16.

reference to the internal dimension of State identity'.⁹⁵ The idea is that 'socialisation processes internal to a State can change the State's identity and interests independently of [inter-state] interaction'.⁹⁶ Accordingly, most scholars who have conducted empirical research have utilised quantitative and qualitative research methods to examine either top-to-bottom or bottom-to-top construction of interests/identities vis-à-vis the social structure of the State system.⁹⁷

It must be pointed out the claims of constructivism, ie the mutual constitution of agent and structure, have been supported by qualitative and quantitative studies. For instance, Finnemore's qualitative study illustrates that the International Committee of the Red Cross (bottom-to-top effect) contributed to shaping States' interests and identities by promulgating and transmitting humanitarian norms (eg the Geneva Conventions).⁹⁸ Similarly, Katzenstein has argued that the European identity affected the social structure of the State system (in Europe) as the role of regional politics in Europe in the form the European Union exhibits (bottom-to-top effect).⁹⁹ In addition, Goodman and Jinks have posited that States linked to one another by network ties (ie membership in the same IGOs) generate social effects in terms of increased and stronger ties between countries which correlate between the convergence of their interests and practices (top-to-bottom effect).¹⁰⁰ They argue that empirical evidence suggests that, when networks are formed through IGOs, convergence of State practices and preferences occurs 'once a critical threshold of States closely interacts in these IGO networks and disappears in parts of the network where a larger number of States have [*sic*] more distant

⁹⁵ Stefano Guzzini and Anna Leander (eds), *Constructivism and International Relations: Alexander Wendt and His Critics* (New edn, Routledge 2006) 13; Yücel Bozdağlıoğlu, 'Constructivism and Identity Formation: An Interactive Approach' [2007] RIntl L& Pol 121, 136.

⁹⁶ Dale C Copland, 'The Constructivist Challenge to Structural Realism' (2000) 25 IntlSec 208, 199.

⁹⁷ Goodman and Jinks, *Socializing States* (n 81); Peter J Katzenstein, *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996).

⁹⁸ Finnemore (n 111) ch 3.

⁹⁹ Peter J Katzenstein, 'Conclusion: National Security in a Changing World' in Peter J Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996) see Regionalism.

¹⁰⁰ Goodman and Jinks, *Socializing States* (n 81) 48.

network ties'.¹⁰¹

International law, which is part of the social structure of the State system, is influenced by the social practice of States in the State system (eg States and international institutions and courts) and at the domestic level State institutions and individuals influence the actions and interests of States. Accordingly, from a constructivist point of view, international law is not simply the product of State wishes and interests independent of the social structure of the States and State system. It must be mentioned that State interests and actions are not only influenced by international law but also by other cultures which may also exist in the State system. International law is simultaneously the product of State actions (causal) and shapes State interests through the socialisation of States (constitutive effect).

The institutionalisation of (social) norms in international law as legal norms is one of the effects of structure in the formation of States' interests. This view does not perceive legal rule as the end of the spectrum of development of a norm. Social norms which have only been internalised to the second-degree (self-interests) as well as norms which have been fully internalised by States could be institutionalised in international law. First, both self-interest norms and norms on the basis of legitimacy are socially constructed (ie what is in the self-interests of States or what is perceived as legitimate norms) (top-to-bottom). Secondly, the institutionalisation of rules in international law is not the only factor that could influence State interests and there are other cultures and discourses¹⁰² (eg the human rights discourse) in the social structure of the State system which can influence States' interests. The ideas or norms which become institutionalised in international law are created through legal discourse (Chapter 2). Legal discourse itself not only includes institutionalised norms in international law but also the process of rule creation. Finally, constructivism is in line with rationalist ideas,

¹⁰¹ *ibid* 59.

¹⁰² Wendt (n 62) 264, 265.

which maintain that State interests constitute the social structure of the State system (bottom-to-top effect). The influence of States through their actions on legal discourse and the influence of legal discourse on States' interests and actions are discussed in the next chapter in the context of custom formation.

3.2. Interests: Constructivist vis-à-vis Rationalist Understanding

It has already been argued that States' interests and the social structure of the State system (eg international law as a subset of that structure) are mutually constitutive. The assertion of this section is that States' interests are socially constructed and guide States' behaviour. This is particularly relevant to formation of law in international law which is based on State actions (signing a treaty, State practice in CIL). The argument in this section is based on the comparison of rationalist theories with a constructivist theory (adopted in this chapter) in relation to constitution of States' interests in the context of international law.

It is contended here that rationalist explanations cannot fully explain the adoption of norms in international law which are inexplicable based on the self-interests of States. Rationalist explanations cannot also explain compliance with international law when material inducements are lacking. On the basis of constructivism, compliance with international law could also be explained on the basis of the legitimacy of its rules or rule creation procedures rather than material inducements alone. In this regard, a constructivist understanding of international law also differentiates between the legality and legitimacy of the rules. Accordingly, in comparison to rationalist theories, a constructivist approach to international law provides a more comprehensive understanding of the creation and change of rules on the basis of mutual constitutions of States' interests and social structure.

According to a rational understanding, State identity and interests are largely

independent from social structures of the international system¹⁰³ and norms are merely the ‘intervening variable or intermediate variable -mediating between interest and political outcomes with little or no independent explanatory power’;¹⁰⁴ ie they do not shape State identity and interests.¹⁰⁵ Both liberalism and realism only accept that structures affect State behaviour but they do not construct actor properties (eg interests or identities)¹⁰⁶ because they perceive them to be ontologically prior to norms and social structure of the international system.¹⁰⁷ Rationalism ‘as an analytical method suffers from shortcomings in the explanation of the full range of real-life behavioural normative phenomena’ and reduces State behaviour to strategies of utility maximisation, the ‘logic of consequences’^{108, 109}.

For realists, it is the structure of the State system that affects State behaviour and, in the social structure of the State system, it is the distribution of capability which is the variable.¹¹⁰ The logic behind self-help is the material distribution of power which drives State behaviour.¹¹¹ For realists, the determining factor of State behaviour is force; for neorealists, the determining factor behind State behaviour is the reward from the interaction with others based on certain acknowledged precepts (self-interest is a determinant of State action).¹¹² Neoliberals, on the other hand, pay more attention than neorealists to norms but only in an instrumental way and posit that States can maintain and maximise their goal of cooperation by adhering to such

¹⁰³ Dixon (n 93) 131.

¹⁰⁴ Annika Björkdahl, ‘Norms in International Relations: Some Conceptual and Methodological Reflections’ (2002) 15 *CamRIntl Aff* 9, 11.

¹⁰⁵ D Panke and T Risse, ‘Liberalism’ in Tim Dunne, Milja Kurki and Steve Smith (eds), *International Relations Theories: Discipline and Diversity* (OUP 2006) 93.

¹⁰⁶ Jepperson, Katzenstein and Wendt (n 69) 6.

¹⁰⁷ Dixon (n 93) 132.

¹⁰⁸ Panke and Risse (n 105) 91.

¹⁰⁹ Dixon (n 93) 132.

¹¹⁰ Wendt (n 62) 249–52.

¹¹¹ Jepperson, Katzenstein and Wendt (n 69) 1.

¹¹² *ibid* 3; ‘Neo-realists conceive environments in terms of distribution of material capabilities (ie military and economic), materialist need not ignore cultural facts altogether rather they treat them as epiphenomenon or at least secondary, as the superstructure is determined in the last instance by the material base’ *ibid*; Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Cornell University Press 2014) 8.

norms.¹¹³ Furthermore, liberal theories are generally ‘open to norms but tend to project homogenous normativity that undermines the value of diversity of international society’.¹¹⁴ According to social constructivism, the value of the argument ‘does not, for instance, depend on the extent to which States cooperate in security affairs’.¹¹⁵

Rational explanations based on the logic of consequences, which take the interests of States as given, cannot account for some changes in State practice. According to constructivism, processes of interest and identity formation are guided by cognitive frameworks are not only subject to rational cost-benefit analysis.¹¹⁶ Social preferences or interests are often incalculable, as a practical matter, and also sometimes actors ‘engage in materially costly, high-risk, and self-destructive practices to avoid social disapproval or to maintain self-respect’.¹¹⁷ For instance, humanitarian interventions or international concerns about human rights violations committed in other States cannot be fully explained by realist or liberalist theories.¹¹⁸ In addition, relatively generous welfare policies ‘representative of moral and humanitarian concerns have prompted foreign aid policies’ which are not easily explained in terms of narrow conceptions of economic self-interest.¹¹⁹

Moreover, Goodman and Jinks have posited that material inducements or exogenously identified interests cannot account for “mimicry” which does not depend on the presence of power (self-interests): hegemonic and counter-hegemonic norms illustrate a pattern of

¹¹³ Thomas (n 112); Price and Tannenwald (n 89) 18; neo-liberalism ‘is sympathetic to the role of norms generally, seeks to explain what proportion of the outcome is explained by the norms and proportion is explained by other factors’ *ibid*; Brunnée and Toope (n 40) 120; neo-liberalist institutionalism generally approach international law ‘instrumentally as a signalling device or product of effective interest projection through explicit negotiation or formal adjudication’ *ibid*.

¹¹⁴ Brunnée and Toope (n 40) 120.

¹¹⁵ Jepperson, Katzenstein and Wendt (n 69) 3.

¹¹⁶ Goodman and Jinks, *Socializing States* (n 81) 168.

¹¹⁷ *ibid*.

¹¹⁸ Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 2005) 65–85.

¹¹⁹ Jepperson, Katzenstein and Wendt (n 69) 9.

diffusion suggesting that the conventional concept of global power politics provides inadequate descriptive accounts (eg the initial disinclination of the UK to sign the Genocide Convention).¹²⁰ They further contend that material inducement explanations cannot account for “persistent decoupling” in all cases.¹²¹ That is, States under the influence of the social structure of the State system adopt policies which are not necessarily in line with the exogenously defined interests of a State. On this basis, neorealism and neo-liberalism have been criticised for overlooking ‘the content and sources of State interests and the social fabric of world politics’.¹²²

State interests (and identities¹²³) do not just exist waiting to be discovered (ie they are not exogenously determined); rather, they are socially constructed.¹²⁴ State interests are variables dependent on social, political, cultural, and historical contexts that are not definite over space and time.¹²⁵ The non-material nature of some rules in the international system, and accordingly in international law, indicate that normative considerations are extant in international law and cannot be accounted for by rationalist theories.¹²⁶ According to the logic of appropriateness, ‘human actors are imagined to follow rules that associate particular identities’ (and consequently interests¹²⁷) ‘to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice

¹²⁰ Goodman and Jinks, *Socializing States* (n 81) 79–80.

¹²¹ *ibid* 77–80.

¹²² Checkel (n 73) 324.

¹²³ Dana P Eyre and Mark C Suchman, ‘Status, Norms, and the Proliferation of Conventional Weapons: An Institutional Theory Approach’ in Peter J Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996) 11; identity of States implies its interests and actions, *ibid*; see also Armstrong and Farrell (n 65) 101; identity is what States are and what States want, *ibid*; Henri Tajfel, *Human Groups and Social Categories: Studies in Social Psychology* (CUP 1981) 255; identities convey to the others about the self and about the others to the self, *ibid*; Hopf (n 66) 175; ‘a State understands others according to the identity it attributes to them while simultaneously reproducing its own identity through daily social practice’ *ibid*.

¹²⁴ Finnemore (n 70) 2; Hopf (n 66) 175–76.

¹²⁵ Hopf (n 66) 176.

¹²⁶ Christian Reus-Smit, ‘Constructivism’ in Scott Burchill and others (eds), *Theories of International Relations* (5th edn, Palgrave Macmillan 2013) 198.

¹²⁷ Jepperson, Katzenstein and Wendt (n 69) 11.

dilemmas and more general concepts of self and situations'.¹²⁸

Constructivism emphasises the discursive power of knowledge and culture even in relation to material power, ie how material power such as wealth and military power is interpreted.¹²⁹ States may still be egoistic and have wealth and power maximising objectives but such interests are socially constructed.¹³⁰ In this context, 'State actions are rigorously constrained by a web of understandings, identities, and interests of other actors that prevail in historical contexts'.¹³¹

Other than their causal and constitutive effects, shared understandings or social norms can have a variety of other effects; they can work instrumentally (eg sanctions or constraints imposed by domestic and international public opinion) and may have permissive or enabling effects permitting alternatives.¹³² What is important to consider based on constructivism is that State interests and actions are influenced by the culture of the State system. Whilst materialist interests such as wealth-maximisation still exist, such interests are also socially constructed and, as such, their existence does not reject the existence of the instrumental use of norms for power or wealth-maximisation objectives.

Constructivism holds that compliance with norms cannot solely be explained by coercion and self-interest but also by the legitimacy of norms.¹³³ This directly rejects the compliance theory, in which compliance to international norms is solely based on the power relations between States and that international law has only little or no effect on State behaviour. Rationalist theories undervalue or disregard the evidence of socialisation processes

¹²⁸ James G March and Johan P Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 Int'l Org 943, 951.

¹²⁹ RBJ Walker, 'East Wind, West Wind: Civilizations, Hegemonies, and World Orders' in RBJ Walker (ed), *Culture, Ideology and World Order* (Westview Press 1984) 3; see also Price and Tannenwald (n 89); March and Olsen (n 128) 949–54.

¹³⁰ March and Olsen (n 128) 952.

¹³¹ Hopf (n 66) 177.

¹³² Price and Tannenwald (n 89) 20.

¹³³ Hopf (n 66) 171.

that persuade States to adopt norms which may not serve or are in contradiction with interests based on self-interest.¹³⁴

Moreover, enforcement tools available at the domestic level cannot explain compliance at the system level because ‘the probable, predictable, direct, imposed costs of disobedience are higher in every mature domestic system than in its international counterpart’.¹³⁵ The capacity of domestic law to elicit compliance is grounded in its special status as a State-sanctioned commitment.¹³⁶ In domestic ‘legal systems, an illegitimate regime may compensate, at least in the short run, for its laws’ illegitimacy by an increased emphasis on enforcement’.¹³⁷

Habermas’ discourse theory claims that voluntary, intersubjective agreement by all those affected by a legal norm provides a basis for legitimation.¹³⁸ Legitimacy ‘depends on the shared beliefs among those rules of the ruler’s rightful authority and it must be intersubjective to regulate social behaviour which is made through social interaction’.¹³⁹ Franck defined legitimacy as a property of a rule or rule-making institution exerting a pull toward compliance on those addressed because those addressed believe that the rule or institution that has come into being, operates in accordance with generally accepted principles of right process’.¹⁴⁰ Actual compliance factor is only one indicator of a rule’s perceived legitimacy.¹⁴¹ Actual compliance is not quite the same as compliance pull: ‘a State may violate a rule because the

¹³⁴ Brunnée and Toope (n 40) 119.

¹³⁵ Franck, *The Power of Legitimacy Among Nations* (n 10) 32; Clark (n 26) 242–3.

¹³⁶ Franck, *The Power of Legitimacy Among Nations* (n 10) 24–9, 32.

¹³⁷ *ibid* 35–7.

¹³⁸ Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, vol 1 (Thomas McCarthy tr, Beacon Press 1981) 385–452; Mark Modak-Truran, ‘Habermas’s Discourse Theory of Law and the Relationship Between Law and Religion’ (1997) 26 CapULRev 461; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, IMT Press 1996) 226–27; Similarly, Reisman submits that communications ‘between elites and politically relevant groups shape wide expectations about appropriate future [State] behaviour’ W Michael Reisman, ‘International Law-Making: A Process of Communication: The Harold D Lasswell Memorial Lecture’ (1981) 77 ASIL PROC 101, 107; Jürgen Habermas, *Communication and the Evolution of Society* (Polity Press 1991) 185.

¹³⁹ Johnstone (n 81) 29.

¹⁴⁰ Dworkin (n 15) ch 6.

¹⁴¹ *ibid* ch. 6.

perception of national advantage to be gained by rule disobedience in a particular instance is so powerful as to overwhelm the most powerful compliance pull'.¹⁴²

According to Franck, the link between legitimacy and legality is the substantive and procedural requirements of legitimacy, ie both substantive and procedural legitimacy factors should be present in the rules of international law to gain legitimacy.¹⁴³ On the other hand, legality or the institutionalisation of norms in international law is a factor of legitimacy perceived by members of the international community.¹⁴⁴ Clark contends that legitimacy is situated in the vicinity of both morality and legality, and thus it cannot be a matter of legality alone.¹⁴⁵ Clark asserts that 'the fact that the representatives of the international society so regularly speak of legitimacy and, separately, of legality clearly suggests that they are taken to be cognate, but not identical, terms'.¹⁴⁶ According to this reading, legality is viewed as a factor which influences the level of legitimacy of a norm.¹⁴⁷

This view is in contradiction with legal realists (positivists) who view legitimacy in light of legality: law is distinct from political or moral values.¹⁴⁸ If legality and legitimacy are identical, the concept of legitimacy becomes essentially redundant, and we might as well speak exclusively of conformity to the law.¹⁴⁹ It is precisely the political space between the two concepts that contributes to normative change in international society, to refinements in international law, and to developments in actual State practice.¹⁵⁰ Clark argues that 'the idea of

¹⁴² Franck, *The Power of Legitimacy Among Nations* (n 10) 24, 46.

¹⁴³ *ibid* ch 11.

¹⁴⁴ *ibid*.

¹⁴⁵ Clark (n 26) 209.

¹⁴⁶ *ibid* 210.

¹⁴⁷ *ibid*.

¹⁴⁸ Franck, *The Power of Legitimacy Among Nations* (n 10) 30–50.

¹⁴⁹ Clark (n 26) 209; See also Tom J Farer, 'Humanitarian Intervention Before and After 9/11' in Robert O Keohane and JL Holzgrefe (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (CUP 2003).

¹⁵⁰ Clark (n 26) 210; Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 145.

legitimacy has a greater role to play precisely at those moments when the legal ground appears least secure, or possibly in flux', which is confirmed by the practice of the UNSC during the post-Cold War period.¹⁵¹ The discourse of legitimacy is employed to reach those parts that cannot be reached by the language of legality alone.¹⁵²

The legitimacy of a norm as stated could act as a stronger force for the internalisation of a norm by other States which have not internalised those norms. As this chapter has noted, interests based both on self-interest and on legitimacy are socially constructed. Chapter Two argues that custom can be created by consensus and binding *usus* alone and that custom can include norms which have been internalised by most States either to the second- or third-degree. If the level of the internalisation of norms is to have any legal effect vis-à-vis their operation with other norms, it has to be based on legal doctrines such as *jus cogens* and *erga omnes*.

4. Conclusion

It was argued in this chapter that the State system is a community since there are shared principles and values among States (Section 2.1). In addition, this chapter explained that the notion of community is inherently intertwined with the notion of obligations and normative considerations (Sections 2.2-3). By adopting a constructivist approach, it was further argued that the interests of the international community are norms that have been internalised by most States (either to the second- or third-degree) and institutionalised in international law (Section 3.1).

This chapter also contended that rationalist theories cannot account for three phenomena in relation to international law. First, they cannot account for compliance with international law that are inexplicable only based on material factors (eg coercion and

¹⁵¹ Clark (n 26) 211.

¹⁵² *ibid.*

sanction). Secondly, they cannot account for rules in international law which are not based on the self-interest of States. Thirdly, they cannot account for the influence of international law on States' actions and interests (Section 3.2).

The distinction between the rules of international law which have been internalised to the third-degree (ie legitimate norms) and those which have internalised to the second-degree (based on self-interests) is arguably more important from a legitimacy, rather than legal, perspective (Section 3.2). The interests of the States which are perceived as legitimate but have not been institutionalised in international law could lead to development of international law in line with those legitimate interests because of the mutual constitution of agent and structure (Section 3.1-2).

The idea that States' interests are socially constructed and guide States' behaviour based on the constructivist idea of the mutual constitution of agent and structure, provides an alternative way to understand the creation of rules in international law. Moreover, it also provides a more comprehensive understanding of how the rules of international law relate to States' interests and the interests of the international community (Section 3.1-2). Accordingly, accepting that States' actions and interests can be influenced by the shared understandings in the social structure of the State system illustrates how custom formation, which is based on State practice, could be produced (Section 3.2). Chapter Two applies a constructivist approach to custom formation in order to determine what international crimes and how they relate to the interests of the international community.

Chapter Two: A Constructivist Approach to the Formation of Customary International Law and International Crimes

1. Introduction

This chapter identifies how crimes that give rise to the dual responsibility of States and individuals could be created in customary law. Examining crimes that give rise to the dual responsibility of States and individuals as customary rules clarifies their legal consequences regarding the rules of jurisdiction and immunities, which have also developed in customary law.

The contention is that customary rules enshrine community interests, which is relevant regarding the interaction of international crimes with the rules of (universal) jurisdiction and immunities in international law. Put together, the findings of this chapter are used in this thesis to answer whether foreign courts have jurisdiction over non-nationals who have committed international crimes on non-nationals abroad, and, secondly, whether the personal and functional immunities of foreign officials are applicable in respect of international crimes.

Crimes in international law that incorporate the dual responsibility of States and individuals as customary rules, could be created by international treaties and resolutions of international organisations if there is a consensus in the international community (Section 3.3). This is on the basis that international crimes as customary rules could be created by binding *usus* alone when there is a consensus in the international community with regards to the crime itself and the binding *usus* involved in its creation (Sections 2.1-2.4).

The fact that binding *usus* alone can generate customary law is explained by the interaction between belief, desire and action (Sections 2.1 and 2.4). A constructivist understanding of custom, which is based on the recognition that belief precedes action, would avoid the circularity inherent in the alternative understanding of the formation of customary law. In the alternative understanding of custom, *opinio juris* is invoked to discern binding *usus* and vice versa (Section 2.3).

Binding *usus* is determined through the discursive practices of the international community, which according to a constructivist understanding inherently comprise the interests of States (Section 2.1). Action is produced because of the desire and beliefs of States as agents (Section 2.1). These interests could be self-interests as norms which have been internalised to the second degree or as interests which have been fully internalised by States and perceived as legitimate (Section 2.1 and Chapter 1, Section 3). In other words, international crimes as rules of customary law are either based on self-interests or legitimacy (Sections 2.5 and 3.3).

There is an international community because of shared values (self-interests and legitimacy) and obligations owed to States as members thereof (Chapter 1, Section 2). The interests of the international community are socially constructed and are those, which have been internalised by States either based on self-interests or on the basis of legitimacy of the norms (Chapter 1, Section 3). Norms, which are internalised by most States either to the second degree or third degree and are institutionalised in international law, could represent the interests of the international community (Chapter 1, Section 2).

Under international law, State actions are legal unless prohibited by international law (Section 3.2) and that international crimes are crimes, which give rise to the dual responsibility of States and individuals under customary law (Section 3.3). The degree of internalisation of international crimes by States cannot have an impact on their legal effects as customary rules (Section 3.3).

The degree of internalisation of norms in the social structure of the State system can, however, expedite their institutionalisation in customary law. When a crime reaches the status of a crime in customary law incorporating the dual responsibility of States and individuals, its legal implications would not be different from other crimes in customary law, whether perceived as less serious or not (Section 3.3).

The degree of internalisation of norms can be relevant to the *erga omnes* obligations, which can comprise some customary rules that have been fully internalised by States. A breach of *erga omnes* obligations creates a right for non-injured States (Section 3.5). On that basis, if it can be proven that crimes giving rise to the dual responsibility of States and individuals are in fact customary rules which are also obligations *erga omnes*, the right created for non-injured States can be considered in the context of the rules of immunity and jurisdiction.

Jus cogens have a strong claim to comprise the interests of the international community which are also perceived as legitimate (fully internalised norms in the social structure of the State system). However, due to difficulties regarding the identification of the source of *jus cogens*, the content of *jus cogens* and their legal consequences outside treaty law, this thesis focuses on the rules of customary law instead (Section 3.4).

2. Constructivist Approach to the Formation of Custom

2.1. Constructivist Approach to Action

This section maintains that customary law is created through State practice alone, which is determined by consensus among States. Further, it contends that binding *usus* and rules of customary law are both determined through the socialisation process. It is argued here that since customary rules emanate from State actions, they inevitably comprise the interests of the international community (either second-degree internalised or third-degree internalised norms). In other words, some customary rules are not only valid as rules of international law but are also perceived as legitimate norms, while other customary rules are based on the self-interests of States only.

The finding that customary rules represent the interests of the international community is independent of the constructivist approach to the identification of binding *usus*. The fact that, for the identification of customary rules, the actions of States (both intra-State and inter-State

evidence) used either as *opinio juris* or as practice or both, is sufficient to justify the fact that customary rules comprise the interests of the international community. The interests of the international community can be either based on the self-interest of States or based on the legitimacy of the norm.

These arguments are explained by examining the interaction between belief and action.¹ First, certain acts may be dis/regarded as binding *usus* (eg treaties, resolutions of international organisations, denunciations of those norms by States, denial of the commission of acts contrary to those norms, and commission of acts contrary to those norms) by a form of diffused consensus among States through deliberation. Secondly, rules of customary law are generated through deliberations in national and international fora as well as through a diffused consensus rather than the individual consent of States.

The rationalist explanation in international relations is that preferences and expectations generate behaviour.² This is known as the equation of desire plus belief equals action,³ which is otherwise known as the intentional explanation.⁴ The desire of actors in the rational explanation is determined exogenously and cannot be influenced by the social processes of the system. Irrespective of the interaction between desire and belief, it is sufficient for customary law formation to posit that, at least regarding individuals, these two elements precede action. However, any theory for ‘predicting action on the basis of reason must find a way of evaluating the relative force of various desires and beliefs in the matrix of decision’.⁵

Hobbes and Hume concur that ‘there cannot be action unless motivated by desire, and done in order to satisfy the desire’.⁶ According to this reading, *action* is conducted on the *belief*

¹ Alexander Wendt, *Social Theory of International Politics* (CUP 1999) ch 3.

² *ibid* 63.

³ *ibid*.

⁴ Jon Elster, *Explaining Technical Change* (CUP 1983) 69–88.

⁵ Donald Davidson, ‘Actions, Reasons, and Causes’ (1963) 60 *JPhil* 685, 796.

⁶ Martin Hollis, *The Cunning of Reason* (CUP 1987) 63.

that a certain *desire* would be achieved.⁷ Two types of beliefs are important: ‘beliefs about the [states of the] external world and *beliefs* about the efficacy of different means to achieve desires’.⁸ Rationalists’ general assumption has been that the agent had complete information (belief) and thus the emphasis was on desire (interest).⁹ Wendt criticises the Humean view of belief and desire as dualistic, since according to the Humean view, action is explained by two unrelated mechanisms and treats desire as a matter of passion rather than cognition.¹⁰

According to the cognitive theory of desire, ‘reason is not the slave of the passions, but cognition is the very basis of desire’.¹¹ This reading proposes that ‘the root of the desire is the perception of value in the world, a perception that is heavily socially conditioned’.¹² Desire is a cognitive phenomenon that is heavily influenced by social learning.¹³ Wendt posits that desires (interests) are themselves cognition or ideas: desires are functions of culturally constituted conditions rather than biology (ie having a materialist foundation).¹⁴

In this respect, the role of deliberation in constituting interests is not merely the weighing of different interests. In other words, ‘it is a complex and highly contested process of discussion, persuasion and framing of issues’ and, in short, what goes on is collective deliberation about the interest of agents in a given situation.¹⁵ Deliberation and interpretive communities play a central role in determining both binding *usus* and the rules of customary law themselves. Deliberations by interpretive communities shape States' actions by influencing States' interests (desires).

Legal discourse can be viewed as a distinctive form of deliberation recognised by

⁷ Wendt (n 1) 117 emphasis added.

⁸ *ibid* emphasis added.

⁹ *ibid*.

¹⁰ *ibid* 119 and 126.

¹¹ R Howe, ‘A Social-Cognitive Theory of Desire’ (1994) 24 J Theory Soc Behav 1, 23.

¹² *ibid*.

¹³ *ibid*.

¹⁴ Wendt (n 1) 120–1; Roy G D’Andrade, ‘Schemas and Motivation’ in Roy G D’Andrade and Claudia Strauss (eds), *Human Motives and Cultural Models* (CUP 1992) 28.

¹⁵ Wendt (n 1) 128.

‘lawyers, policy makers, diplomats, and attentive publics’,¹⁶ which affects the behaviour of States, ie discursive interactions among State and non-State actors affect States’ behaviour.¹⁷ Legal discourse is viewed as shared understandings ‘through the exchange of reasons that are distinctly “legal”’.¹⁸

The processes of argumentation, deliberation and persuasion are ‘important in relation to international law as the law is determined in large measures by claim and counterclaims made by interested parties in response to international incidents’.¹⁹ The structure or form of the ‘legal argument is indeed determinate in that it follows certain recurring patterns – a constant dissociation and association of arguments about normativity and concreteness and an attempt to avoid a material solution’.²⁰

The role of legal discourse should be viewed in light of the fact that international law lacks central organs of judiciary, legislature and enforcement, and, in this environment, legal discourse as a distinct form of persuasion becomes a medium for States to achieve shared understandings on issues that affect them.

Within this process of constituting State interests (deliberation), we could consider the role of governmental and non-governmental organisations, international and domestic institutions, groups and individuals. States are recognised as the main actor in the State system but other agents, as vehicles for distribution of knowledge (or teachers of norms)²¹ also play a role in the process of deliberation.²²

¹⁶ Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organisations* (OUP 2011) 6.

¹⁷ *ibid* 3.

¹⁸ *ibid* 25.

¹⁹ *ibid* 13.

²⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 69.

²¹ Wendt (n 1) 129; Anthony Clark Arend, *Legal Rules and International Society* (OUP 1999) 43–45.

²² Martha Finnemore, ‘International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy’ (1993) 47 *Int’l Org* 565.

Public reasoning and justification occur in the institutions of governments and intergovernmental bodies, as well as political parties, nongovernmental organisations, social movements, and other elements of civil society, whose activities are not confined by national borders.²³ Interpretive communities or teachers of norms set the parameters of legal discourse and pass judgments on legal claims and secondly, they define, interpret and extend the rules of international behaviour, thereby influencing the evolution of the law.²⁴

In this context, the deliberations and argumentations by interpretive communities, which adhere to ‘the responses dictated by the conventions of the enterprise’ are likely to be more persuasive in that community.²⁵ In the international legal system, the legal opinions of different institutions carry different weights. This is dependent on the type of institution and the quality of argumentation engendered in that institution, which is determined by the parameters set by the legal discourse and substantive norms prevalent in that community. In the absence of a central judicial institution in the international system, no single institution has the ultimate interpretive authority, but it could be argued that the ICJ’s legal opinions carry special weight²⁶ and that there are also other interpreters, such as international institutions (eg UNGA),²⁷ with persuasive powers.

Moreover, non-State international actors, unlike States, are not ontologically prior to the State system. International organisations are products of States and the State system, and their qualities are shaped both within States and in the State system, and constantly influence system-level cultures. Just as it would be difficult to define a State without a society, it would be difficult to define international organisations or courts without the State system. Both intra-

²³ Johnstone (n 16) 18; Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 74.

²⁴ Johnstone (n 16) 33.

²⁵ *ibid* 36; Stanley Fish, ‘Fish v. Fiss’ (1984) 36 *StanLRev* 1325; Koskenniemi (n 20) 37.

²⁶ Johnstone (n 16) 40; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 2000) 104.

²⁷ Thomas M Franck, *The Power of Legitimacy Among Nations*, vol 3 (OUP 1990) 87–8.

State and inter-State norm interpreters are influenced by the State system and domestic social structures. Thus, both domestic and international norms interpreters take part in the legal discourse and are at the same time influenced by it. Legal discourse and the deliberations of interpretive communities shape States' desires or interests and thus their behaviour.

In discussing State desires or interests, anthropomorphic qualities are attributed to the State as a unit. This can be explained on the basis that international law recognises State personality (similar to the recognition of corporate agency by domestic legal systems).²⁸ Further, in determining custom formation, there is a reliance on *opinio juris* as the belief of States on the legality of action. Thus international law implicitly in this way recognises anthropomorphic qualities for States. Also, it is also argued that States are similar to people²⁹ and that they have anthropomorphic qualities such as desire, belief and intentionality³⁰ on the basis of the macro-micro-macro process proposed by Goodman and Jinks.

Goodman and Jinks do not posit that 'a State is a person or [that] it exhibits any property of personhood'; rather, they 'claim that patterns of formal State practice suggest that ... [international-] level institutions systematically influence State-level legal and policy choices'. For instance, macro level phenomena (eg human rights treaties) cause other macro-level phenomena (eg changes in State policy) which are ultimately explicable at a micro-level.³¹ Macro-level factors 'influence relevant actors within States, including government officials, members of the national and local media, issue-specific activists, and even ordinary citizens' which in turn 'influence national level legal and policy outcomes'; in other words, a macro-micro-macro explanation.³² Thus, through a macro-micro-macro process, States are capable of producing anthropomorphic qualities.

²⁸ Wendt (n 1) 195–96.

²⁹ *ibid* 193.

³⁰ *ibid* 193–240.

³¹ Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP 2013) 12.

³² *ibid* 40.

The interaction of the belief and action of States conveys that desire or *opinio juris* is the cognition of States and is heavily influenced by socialisation processes. This desire then gives rise to the perception of the relevant legal act, which can be portrayed only in the actions of States. Belief in legally relevant State practice or *opinio juris*, whether viewed as a category of desires or beliefs, is only cognitions or ideas as opposed to actions. Accordingly, *opinio juris* in the theory of custom is an attempt to capture the cognition of States on legally relevant State practice. Cognition could only be portrayed as a form of action, ie the desire of States to uphold existing rules of custom or a desire in manifesting their acknowledgement in legally relevant State practice.

In other words, one cannot determine what the *opinio juris* or cognition of States are unless we look at their actions or other actors' actions (eg international organisations or courts) to discover what is perceived as relevant State practice. On this basis, if States (eg national courts) and international courts and institutions (eg the ICJ) start relying on treaties as a form of binding *usus*, it could be suggested that treaties also count as a form of binding *usus*. In other words, the institutionalisation of rules in international law is socially constructed, eg the instances of States practice which give rise to international law or how treaties become binding.³³

Constructivism views desire as interests and recognises that States' interests are receptive to the culture of the social structure of the State system. On that basis, it is argued that, customary rules comprise the desires of States (through determining binding *usus* and individual customary rules) through binding *usus* as a form of action which enshrines the socially constructed interests of States. Accordingly, rules of customary international law represent the interests of the international community.

³³ Bruno Simma, *From Bilateralism to Community Interest in International Law* (Brill Nijhoff 1994) 235.

Binding *usus* is determined through socialisation processes rather than being pre-determined by any theory of custom formation. *Opinio juris* is a belief and belief cannot materialise without action (whether it is a belief in binding or non-binding *usus*). It is the action that imparts such belief with it; therefore, it is not the belief that is imputed to the action, but rather the reverse. Thus, subjective acceptance is inferred from material behaviour, and the inference of desire from action is produced objectively through discursive practices prevalent in the international community.

Opinio juris could be interpreted as the way in which the perceptions of States are determined; for instance, why judges assign legal relevance to some State practice but not to others.³⁴ *Opinio juris* is the form of action accepted by the States in the socialisation process, which gives meaning to it as relevant or irrelevant legal conduct or when a new rule of custom has emerged. State practice is not an automatic operation and is open to interpretation.³⁵ In turn, ‘the interpretation of State practice depends upon perception’ and is viewed through the lens of culture and interest.³⁶ It is argued here that it is the consensus that emerges in the social structure of the State system, which determines the eligibility of binding *usus*.

2.2. Is Custom Consensus-based?

Consensus is an element which is central both to the discerning of binding from non-binding *usus* and recognising individual norms as rules of customary law. Custom has been held to be ‘a matter of general rather than universal consent, so that a dissenting State cannot free itself by an act of will from the obligations imposed on it by a rule of customary

³⁴ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 140 citing Haggemacher, Peter (1986) ‘Law doctrine des deux elements du droit coutumier dans la pratique de la cour internationale’ (1986) 90 *Revue generale de droit international public* 5.

³⁵ Anthony D’Amato, *Concept of Custom in International Law* (Cornell University Press 1971) 97–98.

³⁶ J Patrick Kelly, ‘The Twilight of Customary International Law’ (1999) 40 *VaJInt’l L* 449, 467.

international law', in reference to new States or to an existing State dissenting to an already established customary rule.³⁷ A practice does not have to be either observed or accepted as law, tacitly or expressly by every State³⁸ to give rise to custom.

Furthermore, the notion of *pacta tertiis nec prosunt nec nocent* is not applicable to customary law.³⁹ Custom can bind all parties, even those which have not participated in their creation – provided they have not objected to their creation.

Having said that, there are suggestions that even the persistent objector principle, one that is associated with the creation of custom, may not be an integral part of the theory of customary international law because it is a new concept based on a doubtful pedigree.⁴⁰ A State (even the most powerful one) cannot persistently object for an indefinite period.⁴¹

A persistent objecting State may eventually be persuaded to adopt the new rule of customary law. A persistent objector State may eventually exclude itself from the customary process in the area governed by the new rule because a persistent objector cannot freeze the development of customary international law so as to benefit itself.⁴² The objecting State puts itself at a disadvantage vis-à-vis other States, as many States appear reluctant to recognise the rights of persistent objectors, thus excluding the advantages of any benefits of the new rule to the objecting State.⁴³ Accordingly, it is the capacity of custom eventually to obligate non-consenting or even persistent objectors that makes customary law consensus-based rather than consent-based⁴⁴.

³⁷ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 Peace (9th edn, Longman 1992) 25–6.

³⁸ *ibid* 29.

³⁹ Krystyna Marek, 'Thoughts on Codification' (1971) 31 *HeidelbergJIntlL* 489, 489.

⁴⁰ Kelly (n 36) 508, 512.

⁴¹ Byers (n 34) 105.

⁴² *ibid* 103–5.

⁴³ *ibid*.

⁴⁴ Franck (n 27) 190; Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757, 766; George Norman and Joel P Trachtman, 'The Customary International Law Game' [2005] *AJIL* 541, 542.

Custom is different from treaty precisely by being something other (“more”) than agreement, but at the same time ‘it seems impossible to think of custom as fully non-consensual’.⁴⁵ If customary law formation was non-consensual, ‘it would become a set of natural principles and vulnerable to the standard objection about the utopian character of natural law’.⁴⁶

The belief that ‘community consensus over individual State consent in modern custom reflects the priority of substantive normativity over procedural normativity in important moral issues’ may not necessarily be correct.⁴⁷ Although this may be one of the implications of recognising community consensus over individual consent, this is not the reason why community consensus should be understood as the most relevant factor in the formation of custom rather than individual consent.

First, as noted, custom has the capacity to bind even persistent objectors. However, binding *usus* is itself recognised through the process of deliberation by interpretive communities. Accordingly, even if it is accepted that a State can object to a rule of customary international law, a State or a group of States do not have the ability on its own to change the perception of States regarding the validity of an act as binding *usus*.

Secondly, since custom is produced through actions, and actions are based on desires or interests, this would mean that some customary rules could be based on the self-interests of States and others on the legitimacy of the norms. Hence, prioritising community consensus over individual State consent does not necessarily entail a higher normative criterion for customary rules.

In consideration of the foregoing, the case can be made that ‘the traditional requirements of generality, consistency and duration are superfluous or, at best, evidence of

⁴⁵ Koskenniemi (n 20) 398–99.

⁴⁶ *ibid* 399.

⁴⁷ Roberts (n 44) 766.

the consent behind them'.⁴⁸ Instead, the recognition of a rule of customary international law depends on the clarity of the norm debated, the clarity of intention to promote a norm of generally applicable international law and the strong consensus in favour of the norm.⁴⁹ Norms are socially defined, and the legitimacy or imputed authority of custom is a product of the relevant social group: it is neither a product of individual consent or central authority.⁵⁰

Common consent does not mean 'that all States must at all times expressly consent to every part of the body of rules constituting international law, for such common consent could never in practice be established'.⁵¹ This is consistent with the ICJ's practice, as the ICJ usually relies on general opinion, not that of States individually.⁵² Common consent does not necessarily mean 'express or tacit consent of States to the body of rules comprising international law as a whole at any particular time'.⁵³ It is not argued here that consent to customary law as a system (eg by relying on custom) justifies the absence of the requirement of individual consent of every State as a whole. Rather, it is the fact that States as a whole partake in the legal discourse prevalent in the international community, either directly or indirectly through the interpretive communities, which sets the parameters of legal discourse. It is the involvement of States in the process of legal argumentation in the social structure of the State system that justifies the non-requirement of explicit consent of every State for every norm.

Moreover, if consensus is not at the core of customary law, then, according to a traditional understanding of custom, new contrary State practice should change or modify the

⁴⁸ Koskenniemi (n 20) 416.

⁴⁹ Jonathan I Charney, 'Universal International Law' (1993) 87 AJIL 529, 546; Frederic Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146.

⁵⁰ Ian Hamnett, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (Routledge & Kegan Pau 1975) 13.

⁵¹ Jennings and Watts (n 37) 14.

⁵² Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) fn 616.

⁵³ Jennings and Watts (n 37) 14.

old rule. In this respect, the traditional understanding of custom does not sit well with the practice of national and international courts, which have widely ignored contravening State practice regarding certain norms in international law, for instance in respect of international crimes.⁵⁴ When considering the customary status of torture, the ICTY declared that ‘no State has ever claimed that it was authorised to practise torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture’.⁵⁵ The ICTY further emphasised that when ‘a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition’⁵⁶ of torture.

The ICTY did not reject the fact that contravening State practice does not have the capacity to change customary law; rather, it qualified this on the basis that the practice was in contradiction of the Torture Convention and that no State has manifested opposition to its provisions. These two forms of actions were preferred over contrary State practice due to a consensus over the prohibition of torture in international law and the non-legal considerations involved in the practices which contravened the prohibition of torture.

The role of consensus over the prohibition of torture is also evident in *Filartiga*, in which the US Court of Appeals emphasised that no government has asserted the right to torture its own nationals.⁵⁷ The US Court further noted that where reports of torture elicit some credence, a State usually responds by denial or, less frequently, by asserting that the conduct was unauthorised or constituted rough treatment short of torture.⁵⁸

⁵⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [189–91]; *Prosecutor v Anto Furundzija* (Trial Judgment) ICTY IT-95-17/1-T (10 December 1998) [137,138 and 147]; *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980) 77 ILR 169 178; *Siderman de Blake v Argentina*, 965 F2d 699 (9th Cir 1992) 103 ILR 455 [717]; *Prosecutor v Kupreskic* (Judgment) ICTY IT-95-16-T, 14 (14 January 2000) [527].

⁵⁵ *Prosecutor v Anto Furundzija* (n 54) [138].

⁵⁶ *ibid.*

⁵⁷ *Filartiga v Pena-Irala* (n 54) 171, 178.

⁵⁸ *ibid* 171, 178.

This way customary law is produced by consensus rather than by the individual consent of States. It has previously been contended, following Dworkin and Franck, that the source of legal obligations in the community is by societal association rather than consent (Chapter 1, Section 1). In this respect, Byers asserts that, if the customary process is accepted as an integral part of international society, it would seem likely that the basis of obligation in international law also lies within the societal character of inter-State relations.⁵⁹ Byers (following Dworkin and Franck) also adopts an interpretation for consent which is reflective of the fact that *the source of obligation* in international law lies in *societal interactions*. Here, it is thus acknowledged that consent may take the form of general consent to the process of customary international law – ie a form of diffuse consensus rather than a specific consent to individual rules.⁶⁰

Norms may be inferred from repeated and consistent acts that are believed to be required by a community and it is ‘the community-wide belief that a norm is legally required that provides customary law with authority and legitimacy’.⁶¹ Regardless of the belief/action discussion earlier, this is in line with the fact that many lawyers have also associated *opinio juris* with a general will among States to be bound.⁶²

2.3. The Role of Opinio Juris and State Practice in Custom Formation

The prevalent method to ascertain *opinio juris* of States has been to infer *opinio juris* from the general and consistent practice of States.⁶³ This is in line with the assertions made here, that belief of the legality of an act is inferred from State acts; however, it is argued that modes of binding *usus* are shaped in the socialisation process and thus, are to some extent,

⁵⁹ Kelly (n 36) 507.

⁶⁰ Byers (n 34) 8.

⁶¹ Kelly (n 36) 453.

⁶² Koskenniemi (n 20) 416.

⁶³ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 44.

fluid.

That said, it must be noted that recent trends have often reversed the process: ‘following the expression of an *opinio juris*, practice is invoked to confirm *opinio juris*’.⁶⁴ For instance, the ICJ in *Nicaragua* stated that consent to resolutions such as the UNGA resolutions is one form of expression of *opinio juris* (with regards to the principle of non-use of force)⁶⁵. The ICJ only relied on the *opinio juris* of States to assert that a customary right of non-intervention existed under international law,⁶⁶ and ignored contrary State practice to the rule of non-intervention.⁶⁷ Similarly, some also argue that treaties and declarations represent *opinio juris* because they are statements about the legality of action rather than examples of such.⁶⁸

The ICTY in *Kupreskic* also acknowledged that, at least in relation to human rights norms, even if a body of State practice consistently supports the proposition that one of the elements of custom, namely, *usus* or *diuturnitas* has not taken shape, *opinio juris* plays a greater role.⁶⁹

It is clear that if an approach (to custom creation which is) based on a clear delineation between *opinio juris* and State practice is adopted, there simply would be no custom, both in relation to the right of non-intervention and torture. However, an approach based on communal consensus which identifies binding *usus* could justify the outcome of these judgments.

The ICTY took the same approach in *Tadic* with regards to Articles 1 and 3 of the Geneva Conventions by putting more emphasis on *opinio juris* rather than the practice of States

⁶⁴ Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2012) 366; Roberts (n 44) 765; Koskenniemi (n 20) 411.

⁶⁵ *Military and Paramilitary Activities in and Against Nicaragua* (n 54) [188].

⁶⁶ *ibid* 202.

⁶⁷ *ibid* 209.

⁶⁸ Roberts (n 44) 758; D’Amato (n 35) 89; Michael Akehurst, ‘Custom as a Source of International Law’ (1976) 47 BYBIL 1, 43; *North Sea Continental Shelf Cases (Germany v Denmark and Netherlands)* [1969] ICJ Rep 3; Pellet (n 52) fn 598; *Prosecutor v Kupreskic* (n 54) [527].

⁶⁹ *Prosecutor v Kupreskic* (n 54) [527].

in reaching their conclusion.⁷⁰ Meron posits that the ICTY took the same approach as the Nuremberg trials by relying on verbal evidence as statements, resolutions and declarations, rather than battlefield or operational practice, which it largely ignored.⁷¹ According to Meron, this methodology was ‘akin more to that applied in the human rights field than in other areas of international law’⁷² whereby, in ‘both human rights and humanitarian law, emphasis on *opinio juris* helps to compensate for scarcity of supporting practice’.⁷³

This approach to identification of customary law is also evident in the judgments of the ICJ, which does not correspond to the generally acknowledged theoretical definition of customary international law.⁷⁴ The examination of the ICJ judgments also demonstrates that, even when the ICJ has proclaimed ‘the theoretical distinction between practice and *opinio juris*, the ICJ mixes them up’⁷⁵. The ICJ mainly refers to ‘the resolutions of international organisations and general treaties’ and, even more importantly ‘the attitudes of the States vis-à-vis these instruments’ (as the ICJ practice of relying on UNGA as evidence of *opinio juris*).⁷⁶ Having said that, the ICJ’s recognition of customary law has generally led to a globally acceptable result.⁷⁷

More than the fact that this approach proves the legal authority for reliance on *opinio juris* as the main element of customary law formation, it also demonstrates the assertion that custom formation is based on consensus rather than on the basis of predetermined and fixed modes of State practice and *opinio juris*. This should be viewed in the context that the instances

⁷⁰ *Prosecutor v Dusko Tadic A/K/A ‘Dule’* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1 (2 October 1995) [99]; Theodor Meron, ‘The Continuing Role of Custom in the Formation of International Humanitarian Law’ (1996) 90 AJIL 238, 239.

⁷¹ Meron, ‘The Continuing Role of Custom’ (n 70) 239.

⁷² *ibid* 240.

⁷³ *ibid*.

⁷⁴ Giorgio Gaja, *The Protection of General Interests in the International Community* (Brill Nijhoff 2011) 37.

⁷⁵ Pellet (n 52) Section 2(a)(bb).

⁷⁶ *ibid* fn 622.

⁷⁷ *ibid* fns 873-74.

of State practice are also formed by consensus through the process of socialisation and are thus fluid to a certain extent.

In this respect, the practice of the ICJ and ICTY are in line with modern approaches to custom, which have generally been inductive with less emphasis on State practice as traditionally understood, but more on *opinio juris*. Modern approaches put more emphasis on declarations and resolutions of international organisations and treaties (ie declare existing custom, crystallise new custom or generate new custom),⁷⁸ and from this perspective, custom can be created rapidly compared with the traditional notion of custom.⁷⁹ The emphasis on *opinio juris*, as opposed to State practice in the formation of customary law, is especially relevant to international crimes and human rights obligations.⁸⁰

International actors (mainly States but including international institutions, international organisations and international courts)⁸¹ shape the culture at the international level, and domestic actors (government institutions, groups, individuals) shape the culture at the domestic level, and both cultures at the domestic level and international level continuously influence each other. Thus, the judgments of international courts, especially the ICJ, are influential in terms of persuading States to adopt a new norm or accept a form of binding *usus*.

If the legal argument does not have not a strong institutionalisation claim in international law, eg based on a treaty which does not have the majority of States as signatories,

⁷⁸ Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian J Intl L* 23, 23; *Military and Paramilitary Activities in and Against Nicaragua* (n 54) [544–45].

⁷⁹ Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles' (1989) 12 *Aust YBIL* 82, 90; Louis Henkin, 'Human Rights and State Sovereignty' (1995) 25 *GaJInt'l & CompL* 31, 37; Ted L Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *HarvInt'l LJ* 457, 457.

⁸⁰ Lori Lyman Bruun, 'Beyond the 1948 Convention - Emerging Principles of Genocide in Customary International Law' (1993) 17 *Maryland JInt'l L & Trade* 193, 216–18; Richard B Lillich, 'The Growing Importance of Customary International Human Rights Law' (1995) 25 *GaJInt'l & CompL* 1, 8.

⁸¹ Kathryn Sikkink and Martha Finnemore, 'International Norm Dynamics and Political Change' (1998) 52 *Int'l Org* 887, 895–900.

then the onus is on the norms interpreter to illustrate in the relevant argument that the norm has become internalised by most States to count as a rule of customary law –ie consensus regarding that norm has emerged.

For instance, in the *Genocide Convention case*, the ICJ held that the prohibition of genocide was a principle recognised by civilised nations.⁸² At the time, most States had not incorporated genocide in their domestic laws and there was not consistent State practice suggesting that genocide was part of customary international law.

That said, there was a strong consensus for the prohibition of genocide and that genocide arguably had been internalised by most States as a social norm considering the historical background of World War II and the tribunals set up to try offenders for crimes including genocide. Thus, there was an intersubjective understanding of its illegality under general international law. The fact that, at the time, no shared understanding of the scope of binding *usus* (ie treaties at least in respect of human rights) existed justifies the ICJ's approach by relying on the principles of civilised nations instead as the legal source for the prohibition of genocide in international law.

Customary rules represent the interests of the community of States,⁸³ which have been internalised to the second or third degree by most States. If, however, a norm has already been internalised by most States and is then institutionalised in international law in a treaty, that treaty will reflect the interests of the international community. For instance, it has been suggested that the UN Convention on the Law of the Sea institutionalised the common interests of States (based on self-interests).⁸⁴ In other words, the internalisation of the Convention's

⁸² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) (Advisory Opinion) [1951] ICJ Rep 15 23.

⁸³ Simma (n 33) 234.

⁸⁴ Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 AJIL 101, 102, citing René Jean. *La communauté internationale entre le mythe et l'histoire*, vol. 4. Economica: Unesco, 1986; Byers (n 34) 9.

provisions by the majority of States preceded its institutionalisation in international law.

Additionally, treaties could also expedite the process of the internalisation of a norm for States that have not yet internalised it. The constitutive and causal effects of the social structure of the State system vis-à-vis States explain why institutionalisation in international law may expedite the process of persuasion⁸⁵ or socialisation. This can occur when a norm has been internalised to the second or third degree by some States and institutionalised in international law in a treaty or a resolution of an international organisation. The other States that have not internalised the norm will be persuaded to internalise it more rapidly due to its recognition by international actors such as international courts.

States perceive fully internalised norms as legitimate but norms internalised to the second-degree have a more bilateral basis and are only based on the self-interest of States.⁸⁶ It is with the third-degree internalisation that a norm constructs agents (shaping their identities), in which case the quality of compliance and resistance to normative change will be high.⁸⁷ Thus, when an agent propagates a new norm if it challenges existing internalised norms, the resistance to change will be higher, depending on its internalisation degree.⁸⁸ In this regard, any claim for a new rule of customary law which challenges any existing customary rule with a high degree of internalisation by States would have passed a higher evidential threshold to replace or modify the old rule.

2.4. Treaties and Resolutions of International Organisations

The fact that the courts have refrained from referring to treaties or resolutions of international organisations as instances of State practice could be explained on the basis that there is a possibility to conflate custom with treaty if a strict approach (inferring custom from

⁸⁵ Sikkink and Finnemore (n 81) 900–2.

⁸⁶ Simma (n 33) 247.

⁸⁷ *ibid* 229–55; Gaja (n 74) 20–21.

⁸⁸ Wendt (n 1) 273.

treaties) is adopted. That is, if treaties are accepted as the necessary and sufficient form of State practice to create customary law. However, it could be argued that treaties or resolutions of international organisations as a general rule could be considered as a form of State practice in international law that contribute to customary law formation.

In this respect, a treaty which even gains the support of most States will not necessarily produce customary law. Rather, it can be used as a form of State practice along with other binding *usus* which portray the consensus among States. For instance, the fact that rules such as torture are repeated in many international instruments and treaties, and that almost all States proscribe acts of torture, is sufficient on a general level to prove that such a consensus exists.

Accordingly, the circularity in custom ascertainment (ie *opinio juris* is extracted from practice and vice versa) could be avoided *if there existed* a general rule (whatever its status) as to which practices lead to custom formation and which do not.⁸⁹ It seems reasonable in light of the difficulties with the ascertainment of custom, and specifically the *opinio juris* of States, instead of requiring *opinio juris* as the subjective element of States, that the focus should instead be on a method for identifying objectively the claims of legality by well-recognised legal authorities.⁹⁰

International and national courts (as agents in the socialisation process) rely on multinational treaties, resolutions of international organisations, States' denunciation of certain acts and States' reluctance to admit the commission of certain acts (because of their belief in their legality) in the process of the identification of customary rules⁹¹. This can be justified by

⁸⁹ Koskenniemi (n 20) 433, emphasis added.

⁹⁰ D'Amato (n 35) 82–85.

⁹¹ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [189–91]; *Prosecutor v Anto Furundzija* (Trial Judgment) ICTY IT-95-17/1-T (10 December 1998) [137, 138 and 147]; *Filartiga v Pena-Irala* (1980) 77 ILR 169, 178; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) 18 (Advisory Opinion) [1951] ICJ Rep 15; *Siderman de Blake v Argentina* 103 ILR 455 (1992) [717]; *Prosecutor v Kupreskic* (Judgment) ICTY IT-95-16-T, 14 (14 January 2000) [527].

a shared understanding among actors of the State system that these instances could be used as relevant legal State practice. This shared understanding has developed in the social structure of the State system by way of interaction of intra-State elements (ie practice of national courts and States internally) and inter-State elements (ICJ and treaties) through the processes of socialisation.

Accordingly, these actions could be considered as relevant legal conduct in the formation of a custom. This is in line with the courts' approach and that of others who contend that custom could be created rapidly if the new rule of international law has its origin in, or is soon reflected in, a multilateral treaty of general application.⁹² Additionally, some norms in human rights treaties have quickly been transposed to customary law.⁹³ This can be based on the consensus that quickly emerged on the inter-State level regarding the customary status of a norm and the fact that the norm was internalised by States prior to its institutionalisation in international law. In other words, these norms had been internalised at least by most States and were perceived as legitimate norms or represented the self-interests of States, prior to their institutionalisation in international law.

Some writers argue that resolutions of international organisations adopted by consensus or a near-unanimous decision may declare that a rule has become generally accepted.⁹⁴ On the other hand, it has been argued that according to the ICJ's practice, treaties cannot be considered as an element of State practice but the attitudes of States vis-à-vis the treaty, either during its negotiations or regarding its acceptance, can be more important than the text itself.⁹⁵ Moreover, some writers argue that the attitudes of States at diplomatic conferences or in international

⁹² Jennings and Watts (n 37) 30: eg in relation to Continental Shelf and exclusive economic zone.

⁹³ Charney (n 49) 549; Louis Henkin, *International Law: Politics, Values and Functions* (Brill 1989) 223–26; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 95–98.

⁹⁴ Louis B Sohn, 'Generally Accepted International Rules' (1986) 61 WashLRev 1073, 1074.

⁹⁵ Pellet (n 52) fn 590-92.

organisations, as well as the practice of the organisations themselves, can also be of paramount importance in establishing the existence of the material element.⁹⁶

The inconsistencies that are generated if higher recognition is given to individual States' opinion in international organisations can take place in cases where a treaty also addresses the rule under discussion. In this way, the consensus of States around an issue which is institutionalised in a treaty is ignored, and priority is given (by the form of State practice) to individual States' opinions at diplomatic conferences for evidence of State practice. This cannot create a more coherent and accurate result than referring to the treaty or instrument itself directly.

The statements of States in pre-treaty negotiations should be considered, but not as important as the treaty itself, which objectively portrays the wishes of States in the form of consensus. Any form of reliance on statements or other acts of that nature has the potential of being subjected to the values of the interpreter and selective recognition of the relevant data and thus subjectivity.

The ICJ in *Nicaragua* (also the ICTY as discussed above) inferred the existence of a customary rule mainly on the basis of the resolutions of international organisations as *opinio juris*. Nonetheless, the fact that the ICJ or other courts do not refer to treaties or resolutions of international organisations as modes of State practice does not undermine their role in customary law formation.

Furthermore, this thesis proposes that mainly binding *usus*, which is backed up by consensus, could generate custom. This approach precludes the inconsistencies associated with the balancing of *opinio juris* and State practice in the formation of custom, as the balancing approach has the capacity to reproduce the circularity between *opinio juris* and State practice.

For instance, one proposed approach seeks to balance what the practice has been with

⁹⁶ *ibid* fns 593-94.

what the practice ought to be on the basis of normative considerations of the community (*lex lata* and *lex ferenda*).⁹⁷ In this context, practice would be descriptive, but *opinio juris* could represent both *lex lata* or *lex ferenda*.⁹⁸ *Opinio juris* is used to extract the subjective values of States, so that they are given sufficient expression in legal form.⁹⁹ Multiple eligible interpretations of State practice must be balanced against substantive considerations and defects of practice may be compensated ‘if the principles of that interpretation are particularly attractive’.¹⁰⁰

The flaw with this account is that *opinio juris* counts as *lex lata* when assessing State practice but as *lex ferenda* when assessing normative considerations. This approach also fails to justify the distinction between binding and non-binding *usus* fully. This is not to deny that certain actions or inactions may or may not be considered for the purposes of custom formation; rather, there must be a justified reason behind this selection of actions or inactions as binding *usus*.

The approaches which seek to create a form of balance or equilibrium between State practice and *opinio juris* can be considered from two perspectives: the reluctance to recognise the treaties or resolutions of international organisations as a form of binding *usus*; and the emphasis on consent-based rather than consensus-based custom. The inductive processes of identification of customary law on a consent-based basis will also be incomplete due to the impossibility of including the practice of all of the States. Any such inductive analysis will be subjective on the basis of the values and interests of the interpreters and will be limited only to considering the practice of a handful of States.

Moreover, a State’s commitment to become a signatory to a treaty, objectively, may

177. ⁹⁷ Roberts (n 44) 760, 765; Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986)

⁹⁸ Roberts (n 44) 763.

⁹⁹ *ibid* 779.

¹⁰⁰ Dworkin (n 97) 257.

convey a stronger sense of legal obligation on behalf of a State compared with the opinions of governmental advisers or official publications. This is on the basis that States do not have central organs to present their views and policies on international law comprehensively, and to act on such views and policies in a coherent manner.

Different branches of governments do not necessarily hold the same view on the same issues pertaining to international law. The absence of central organs in States to make the policies and actions of different organs of the State coherent, in a manner whereby on every issue a State can have one voice and actions confirming such views, makes the task of an independent inquiry on the existence of a customary rule very difficult, if not impossible.

Furthermore, the willingness of a State to become a signatory to a treaty or to support a resolution of an international organisation is one of the best manifestations of State policy towards international law. Such actions are debated at the highest institutions and offices of a State and therefore the value of such actions should be reflected in the ascertainment of rules of customary law.

On the basis of these explanations, it is contended that the resolutions of international organisations and treaties could also be taken into consideration as evidence of State practice,¹⁰¹ if they are accompanied by a sense of consensus in relation to the provisions of the treaty or the resolution in question. Recognising resolutions of international organisations and treaties as a form of State practice also serves a procedural advantage, as States with fewer resources will get equal footing to express their views on international law. This does not empower a minority of States to bind the majority,¹⁰² since if a claim is not based on consensus, it would not be accepted as a rule of customary law. Despite the fact that the courts have generally phrased their reliance on treaties or resolutions of international organisations as *opinio juris*,

¹⁰¹ Richard A Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60 AJIL 782.

¹⁰² *ibid.*

their reliance could be interpreted as State practice itself if the implications of their decisions are taken into account.¹⁰³

Accordingly, the case can be made that within the social structure of the State system a culture has emerged (through the process of socialisation), that during the process of identification of a rule of customary law, if the interests of the community of States (whether based on legitimacy or self-interests), which themselves give rise to States' actions, are at odds with a certain State practice, then that practice could be ignored. For example, non-recognition of the commission of torture as binding *usus*. Conversely, if they are conducive to the interests of the community of States (whether in the form of action or inaction), then they could be considered as binding *usus*. The action or inactions, which are conducive to the interests of the international community are determined through the discursive practices of norms interpreters. These are boiled down to claims and counter-claims on the status of acts within the discursive communication of norms interpreters.

On that basis, since it is argued that binding *usus* is determined through a process of socialisation rather than merely based on a pre-determined set of actions or beliefs, it is fluid in the sense that it could undergo change or accept exceptions to any general rule. Accordingly, customary law can be described as *the language of interaction* and could be viewed as an unwritten code of conduct and custom confers meaning on 'on foreseeable and approved actions, which then furnish a point of interaction for ongoing interactive responses'.¹⁰⁴ That being the case, a significant function of custom 'is precisely that of communication, of labelling

¹⁰³ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [189–91]; *Prosecutor v Anto Furundzija* (Trial Judgment) ICTY IT-95-17/1-T (10 December 1998) [137, 138 and 147]; *Filartiga v Pena-Irala* (1980) 77 ILR 169, 178; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) 18 (Advisory Opinion) [1951] ICJ Rep 15; *Siderman de Blake v Argentina* 103 ILR 455 (1992) [717]; *Prosecutor v Kupreskic* (Judgment) ICTY IT-95-16-T, 14 (14 January 2000) [527].

¹⁰⁴ Lon L Fuller, 'Human Interaction and the Law' (1969) 14 AmJJuris 1, 2–3.

acts so that there can be no mistake as to their meaning'.¹⁰⁵

The process of legal discourse, deliberation and *norm interpreters* distinguish the binding *usus* from non-binding *usus* and identify the individual norms of customary international law. A norm interpreter such as the ICJ persuades other actors to accept a certain conduct as binding *usus* and to recognise a rule as customary law. It is through the discursive practice of domestic and international norms interpreters that meaning is given to binding and non-binding *usus*. Legal discourse determines the boundaries of legally relevant State practice in which rule interpreters such as courts and legal scholars play a vital role. These shared understandings regarding the legality of certain acts are shaped over a long period of time through persuasive argumentation utilised by norm entrepreneurs. International fora resemble the deliberative processes extant in domestic legislative processes.¹⁰⁶ Shared understandings of binding *usus* are 'based on the general acceptance by States of the customary process, as signalled by their reliance on customary rules and their acknowledgement of the potential validity of claims made by other States based on similar rules'.¹⁰⁷

2.5. Criticism of the State Practice Approach to the Formation of Customary

Law

Having said that, there is opposition to the fact that State practice alone could amount to rules of customary law. Criticism of State practice as the only criterion for the emergence of customary law has generally been directed at two main schools of thought which propose that State practice alone can produce customary law.

The first one is based on normative theories (eg New Haven's policy-oriented concept based on "human dignity") which 'redefine customary law in a manner that eliminates the

¹⁰⁵ *ibid* 6.

¹⁰⁶ Charney (n 49) 547.

¹⁰⁷ Byers (n 34) 19.

requirement of internalised beliefs of the community'.¹⁰⁸ This approach tries 'to identify as relevant practice such behaviour which corresponds to material criteria of justice'.¹⁰⁹ It suggests that a practice amounts to custom if it is 'in conformity with the social needs of a legal order' or if it corresponds to 'reasonableness or moral utility'.¹¹⁰

Such considerations have been criticised as 'utopian' since justice, social need, reasonableness and moral utility are subjective notions and 'cannot be used to achieve a determinate delimitation between practice which is and which is not law'.¹¹¹ It is not contended here that a higher value or rule should guide the creation of rules of customary international law on the basis of a pre-determined notion. Rather, customary rules are determined through the actions of States which represent their interests (ie desires) and the form of binding *usus* is determinate through the discursive practices of the international community in which all States play a role through their representatives in international and domestic institutions.

The second approach holds that 'statements alone or the accumulation of international instruments may be sufficient to create customary international law'.¹¹² On that premise, this approach has been held to have the potential to substitute 'the normative claim of one or a few powerful States for that of the community'.¹¹³ That said, if international instruments are accompanied by a sense of consensus regarding the rule in question, then this criticism is not relevant. As discussed, resolutions of international organisations could convey the consensus of the community of States pertaining to a rule of international law, and that resolutions of international organisations or treaties are not the only indicator of consensus among States. The argument made here was not that an accumulation of international instruments alone could give rise to custom.

¹⁰⁸ Kelly (n 36) 504.

¹⁰⁹ Koskenniemi (n 20) 412.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² Kelly (n 36) 504.

¹¹³ *ibid* 507.

It could be argued that if customary law is boiled down to State practice, it would essentially entail that States can never act illegally as whatever they do amounts to custom and that reliance on State practice alone has the potential of lowering custom to the will and interests of States devoid of the normative convictions of the community.

That said, binding *usus* and non-binding *usus* are determined through discursive practices in the international community, and the fact that binding *usus* represent States' interests is inconsistent with the assertion that State practice alone cannot comprise community interests. States' interests could be based on the legitimacy of the rule or the mere self-interests of States, but when these actions of States are based on interests which are fully internalised and are perceived as legitimate, they could also contain normative convictions of the community in that sense. Discursive practices through consensus ensure that acts which are recognised to be conducive to the interests of the international community (either based on self-interests or the legitimacy of the rule) are recognised as binding *usus*.

Moreover, it has also been argued elsewhere that 'legal rules are more likely to be respected even when *the outcome is unfavourable* if they are the product of *the process perceived as legitimate*' and 'compliance in a centralised system is more likely if States have participated in the process, accepted norms, and then internalised them into their own decision-making process'.¹¹⁴ The consensus-based customary law proposed here is based on the legitimacy of the process which leads to the annunciation of a rule as customary international law. It was not contended that every State's practice would be taken into account or that the process is transparent in the way that, for example, it is with regard to treaty-making.

The process is legitimate in the sense that it ensures binding *usus* are recognised in the discursive practices prevalent in the social structures of inter-State and intra-State leading to a

¹¹⁴ *ibid* 531, emphasis added; Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1997) 19 *MichJInt'l L* 345, 353–4; Stefan Machura, 'Introduction: Procedural Justice, Law and Policy' (1998) 20 *L& Pol'y* 1, 353–4.

form of diffused consensus on the formation of rules of customary law. In relation to the actions of States with regard to legitimate norms, it was stated in the previous chapter that actors which have fully internalised norms (which they perceive as legitimate) would automatically follow them. Thus, if a rule is proclaimed to be a rule of customary law but has not attracted legitimacy, it is more likely to be subject to change as it is only based on the self-interests of States rather than legitimacy. In this way, custom is an evolutionary source of law¹¹⁵ which is identified in instances of binding *usus* on the basis of consensus. This undermines the argument that the customary law process is not capable of adequately incorporating the interests and concerns of many States in international society.

This argument is based on the assumption that, until a norm is fully internalised by States, it does not illustrate the normative conviction of the community. However, the internalisation of norms from a constructivist perspective does not necessarily require legal incorporation into the domestic legal system. There is a difference between social internalisation and the institutionalisation of norms that can be explained by the ICJ's dictum in the case of *South West Africa*. The ICJ asserted that 'humanitarian considerations may constitute the inspirational basis for the rules of law', but that such considerations do not in themselves amount to rules of law and the fact that all States have an interest in an issue 'does not itself entail that interest is juridical in character'.¹¹⁶ Whilst legality is a factor of legitimacy; it is neither a necessary nor a sufficient factor for the legitimacy of a rule.¹¹⁷

The process of the formation of customary law proposed here is based on the premise that the social processes of the State system provide ample opportunity for the inclusion of

¹¹⁵ Roberts (n 44) 758; Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 HarvLRev 539, 566–70.

¹¹⁶ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6 [50]; Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, vol 2 (CUP 1991) 187.

¹¹⁷ Franck (n 27); Arend (n 21); Thomas M Franck, *Fairness in the International Legal and Institutional System* (Brill Nijhoff 1993).

States' preferences in the formation of custom. Additionally, even if one takes the view that the consent of all States is required (which, as mentioned before, is practically impossible and does not represent how national and international courts have identified customary rules), this could be rejected because illegitimate processes may lead to legitimate norms.¹¹⁸ Whilst the process of norm generation and norms may be related, they are not correlative. Thus, even if it is assumed that the process of formation of customary international law is not legitimate, it cannot be concluded that norms engendered are also illegitimate and accordingly will not carry compliance pull.

The view that the formation of custom on the basis of consensus is illegitimate was rejected in this chapter on the basis that all States play a role in the creation of norms and the recognition of binding *usus* in a form of diffused consensus through legal argumentation and discourse. In this way, the resolutions of international organisations and treaties make possible the rapid, and unquestionable entry into force of normative rules within a process that is more transparent (compared to the traditional understanding of customary international law) and that the interests and wills of States are better served.¹¹⁹ Further, the authority accorded to the ICJ or international courts is viewed from the perspective of the persuasiveness of their arguments regarding the existence of a rule of customary law.¹²⁰

It has been argued elsewhere that not all customary rules can enshrine community interests. Accordingly, there exist two types of rules of customary law. For instance, Koskenniemi, citing the judgment of the ICJ in the case of *Gulf of Main*, asserts that customary rules could be categorised into two categories.¹²¹ The ICJ held that 'customary international law in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation

¹¹⁸ Franck (n 27) 25.

¹¹⁹ Charney (n 49) 547–48.

¹²⁰ Kelly (n 36) 477.

¹²¹ Koskenniemi (n 20) 404–6.

of the members of the international community [utopia], together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas [apology]’.¹²² Similarly, Roberts argues that there are generally two categories of custom; one that is facilitative (enhances cooperation and maintains co-existence) and another that upholds commonly held subjective values by the majority of States.¹²³

Koskenniemi’s interpretation of the ICJ’s dictum in *Gulf of Main* is that there is a “naturalistic” custom, which is distinguished from a “regular” custom by being more “vital”, and the fact that it does not need the kind of backing from past practice and consent.¹²⁴ Accordingly, these general principles are positivised as ‘generalisation from past practice, principles of municipal jurisprudence or derivations from what nations or peoples have accepted in their conscience’.¹²⁵ Koskenniemi raises doubt as to the link between such generalisations and State practice (elementary considerations of humanity, the prohibition of aggression, of genocide, of racial discrimination, etc) because they are not supported by producing impressive lists of past compliance.¹²⁶

The notion that actual past practice does not support some of these norms may not be correct. Although these crimes do occur and that all modes of State practice (whether binding *usus* or not) do not coherently support a customary law claim regarding their status, this should be seen in light of the fact that the majority of States do not practice such crimes. If they are recognised as crimes under customary law, then contrary State practice are merely breaches of the rules of customary law. If the contention is that there is ample contrary State practice to

¹²² *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Judgment) [1984] ICJ Rep 246 [111].

¹²³ Roberts (n 44) 762–64: defines morality as commonly held subjective values; Kelly (n 36) 479–80; HLA Hart, *The Concept of Law* (OUP 1994) 225.

¹²⁴ Koskenniemi (n 20) 408.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

suggest that these norms have changed or had never been formed in customary law, it could be rebutted by the assertions made here: State practice and norms are determined by discursive practices and as such preclude the reliance on contrary State practice in relation to international crimes.

Nonetheless, the reference to the conscience of nations and their people resonates with the third-degree internalisation of norms proposed by Wendt, which may elevate a rule to the status of customary international law with little or no practice. The second category of customary rules as proposed by both Koskenniemi and Roberts also resonates with both second-degree internalisation and third-degree internationalisation of norms.

Furthermore, the PCIJ in *Lotus* stated that ‘rules of international law emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims’.¹²⁷ This dictum of the PCIJ relates to second- and third-degree internalisation, as well as to the two kinds of custom: the coexistence custom and the custom that enshrines community interests, both of which are derived from binding *usus*.

Additionally, a culture based on enmity and total anarchy (based on brute force) cannot be institutionalised in international law because if international law tolerates the threat or use of force, it will lose its credibility or legitimacy.¹²⁸ The shared knowledge that constitutes rival (self-interest, the initiation of the persuasion process) and friendship (third-degree, complete internalisation, legitimacy) ‘cultures are to a large extent institutionalised in international law with a corresponding manifestation at the domestic level’.¹²⁹

The fact that there are two kinds of customary rules on the basis of the degree of their

¹²⁷ *Case of SS ‘Lotus’ (France v Turkey)* [1927] PCIJ Ser A No 10 18.

¹²⁸ Wendt (n 1) 272.

¹²⁹ *ibid.*

internalisation by States – either second degree, based on self-interests, or third degree, based on the legitimacy of the norms – does not mean that customary rules which are legitimate can be made even in the absence of binding *usus*. The justification proposed by Koskenniemi is based on the assumption that inevitably there are no recognised criteria to distinguish binding and non-binding *usus*, which could attest to their customary status whilst at the same time taking into account the normative convictions of the community.

It is ideas that give meanings to actions. The socialisation process determines both the source and content of norms by clarifying the interests of States and their relationship with international law. The process of socialisation determines the binding *usus* and individual rules of customary international law. These explanations of custom, both that it comprises some of the interests of the international community, ie those which have been institutionalised, and that its formation is heavily influenced by the process of socialisation, assist in identifying how international crimes are made in customary law.

Having said that, there is also a view maintaining that community interests could not be created in a system, which has only States as the main actors in its law-making process and that States could not, by default, create interests, which are not subservient to their own special needs.¹³⁰ Unless one acknowledges that States (and the officials who represent States) and their citizens are separate entities, adhering to non-overlapping values and norms, the idea that States are incapable of creating norms which serve the interests of States collectively cannot be upheld. The view that community interests or the shared interests of States (either based on the collective self-interests of States or the legitimacy of norms) cannot be created is based on a rationalist explanation of interests which takes States' interests as given and ignores the influence of legal discourse and deliberation on States' interests (Chapter 1, Section 2).

¹³⁰ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Palgrave Macmillan 2002) 86.

The common interests or community interests are to be differentiated with interests that are internalised by States, which include murder, but have not been institutionalised in international law. Institutionalisation of a norm in international law correlates with the worldwide spread of governmental policies and structures related to the norm: ‘institutionalisation involves the process by which rules and shared meanings move from abstraction to specific expectations and, in turn, taken for granted frames and relatively uncontested scripts’.¹³¹

Community interests are the interests of States, which have been internalised by most States and institutionalised in international law. Thus, for instance, if a crime such as murder (over which some States do exercise universal jurisdiction on the basis of ordinary crimes such as order) is institutionalised in international law by a treaty or a multinational convention, and this is supported by further State practice in the form of universal jurisdiction, murder could become an international crime in a relatively short period of time.

Some norms may be objectively conceived as beneficial to the international community or even legitimate, but have not been institutionalised in international law, eg the protection of the environment. States in the international community as a whole, through their actions, reflect their views about certain values and norms and their perceived significance (by looking at the established principles of customary international law). For instance, there have been attempts to give customary law status to the duty to protect the environment from global warming.¹³² Whilst the interest to the community of States for this duty may be objectively established, the customary nature of the alleged duty is dependent on its recognition by States through modes of binding *usus*, even if it is assumed that the duty to protect the environment has been

¹³¹ Goodman and Jinks (n 31) 49.

¹³² Eva M Kornicker Uhlmann, ‘State Community Interests, *Jus Cogens* and Protection of the Global Environment: Developing Criteria for Peremptory Norms’ (1998) 11 *GeoInt’l Env’tl L Rev* 101; Lynn Berat, ‘Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law’ (1993) 11 *BUInt’l LJ* 327.

internalised by States.

The subjective recognition (or consensus) of the duty to protect the environment as a norm, which is vital to the interests of the international community, does not yet exist. There has not been even one instance of prosecution concerning global warming or damaging the ozone layer, either domestically or internationally. In relation to State responsibility, no proceeding has ever been brought against a State under this alleged duty. Whilst there are a few treaties that deal with global warming and the protection of the ozone layer, there is a lack of national legislations in terms of creating an obligation for officials/individuals in this regard. International law may, however, develop to recognise such a duty as a customary rule of international law.

3. Common Interests and International Crimes

3.1. Introduction

This thesis contends that crimes (or outlawed acts) which have gained the status of customary law give rise to universal jurisdiction due to the interests which they protect (Chapter 3) and override the functional immunity of officials (Chapter 4). The modes of formation of customary law (which includes treaties) can illustrate how international crimes are made in customary international law, as well as the fact that crimes under customary law represent community interests.

This thesis has treated community interests as the self-interests of States produced in some customary rules that have been internalised to the second degree by States, as well as customary rules based on the legitimacy of the norms, which have been internalised to the third degree by States. This section proposes that international crimes in customary law are created if binding *usus* attests the existence of custom and there is a consensus among States as to the prohibition of the crime in international law, establishing responsibility for both States and

individuals.

3.2. *General Approach to International Law*

This section first considers the applicability of the general rule that State actions are legal unless outlawed by international law. This is argued with reference to the judgments of the ICJ in *Nuclear Weapons* and *Kosovo*. In the *Nuclear Weapons* case, the UNGA posed the following question to the ICJ: ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’¹³³ Use of the word ‘permitted’ was criticised by some States because, according to those States, such wording implied that the threat or use of nuclear weapons would only be permissible if authorisation could be found in treaty or customary law.¹³⁴ Those States claimed that States are free to use nuclear weapons *unless they are forbidden* to do so *by a prohibitive rule* in either treaty or customary law.¹³⁵ Those States referred to the PCIJ's judgment in the *Lotus* case and the ICJ's judgment in *Nicaragua*.¹³⁶

It has been argued elsewhere that the strategy of the ICJ was to find a specific rule prohibiting or authorising the threat or use of nuclear weapons, in which a wide majority of the judges found neither.¹³⁷ However, the ICJ in the *Nuclear Weapons* case recognised that States are permitted to take any course of action unless it is prohibited by international law. The ICJ recognised this approach by the methodology it adopted in ascertaining the legal status of the use/threat of nuclear weapons; ie by examining whether under international law the use of nuclear weapons was forbidden. The ICJ focused on the applicability of environmental laws, the Genocide Convention, the ICCPR, the UNCH on the use of force, and the applicable law

¹³³ Request for Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, UNGA Res 49/75 (15 December 1994).

¹³⁴ *Legality of the Threat or the Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [21].

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) 14 fn 14.

in the situation of armed conflicts to ascertain whether any *prohibition* for the use/threat of nuclear weapons existed in international law.¹³⁸ The ICJ asserted that ‘State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition.’¹³⁹

In determining the applicable law in situations of armed conflicts, the ICJ took into account the treaty and customary law *prohibiting* the use/threat of nuclear weapons and the applicability of humanitarian laws in relation to the *prohibition* of the use/threat of nuclear weapons.¹⁴⁰ In fact, the ICJ’s decision not to rule out emphatically the use/threat of nuclear weapons in all circumstances highlights that the ICJ assumed the use/threat of nuclear weapons was permitted unless prohibited by international law. The ICJ’s conclusion – that the legality of the use of nuclear weapons in extreme circumstances of self-defence cannot be ruled out – was based on the following considerations: the UNCH on self-defence (the principles of necessity and proportionality); non-prohibition of the use of nuclear weapons in customary or treaty law; and the application of humanitarian law. In other words, the presumption was that States were permitted to use nuclear weapons unless prohibited, subject to the above relevant considerations to the presumed rule.

Similarly, in *Kosovo* the ICJ was requested by the UNGA¹⁴¹ to determine whether the unilateral declaration of independence by Kosovo was in accordance with international law.¹⁴² The ICJ observed that the answer to that question turns on whether or not the applicable international law prohibited the declaration of independence.¹⁴³ The ICJ posited that it is

¹³⁸ *Legality of the Threat or the Use of Nuclear Weapons* (n 134) [24–44].

¹³⁹ *ibid* 52.

¹⁴⁰ *ibid* [51–66] and [74–91].

¹⁴¹ Request for Advisory Opinion of the International Court of Justice on whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law, UNGA Res 63/3 (8 October 2008) A/RES/63/3.

¹⁴² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 [1–16].

¹⁴³ UNGA Res 63/3 (8 October 2008) A/RES/63/3 (n 141).

entirely possible for particular acts, such as a unilateral declaration of independence, not to be in violation of international law without necessarily constituting the exercise of a right conferred by it,¹⁴⁴ and that international law (ie State practice) during the eighteenth, nineteenth, and early twentieth centuries contained *no prohibition* of declarations of independence.¹⁴⁵

The ICJ continued that the *non-prohibition* of declarations of independence continued in the second half of the twentieth century during which the rule of self-determination developed in such a way as to create a right of independence for the peoples of non-self-governing territories and for those subject to alien subjugation, domination and exploitation.¹⁴⁶ The ICJ considered that general international law contained *no applicable prohibition* of declaration of independence; accordingly, the declaration of 17th February 2008 did not violate general international law.¹⁴⁷ Moreover, in *Arrest Warrant*, Judge Wyngaert suggested that the dictum in the *Lotus* case not only applies to the international law of jurisdiction but is also an authority on the formation of customary law.¹⁴⁸

3.3. Customary International Law and International Crimes

The definition of an international crime or international offence is one of the most problematic terms since a ‘generally accepted definition or list of international crimes does not exist’.¹⁴⁹ There is ‘no international consensus that defines the category of crimes that constitute customary international law and would, therefore, allow for universal jurisdiction to be

¹⁴⁴ *ibid.*

¹⁴⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 142) [79].

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid* 81 and 84.

¹⁴⁸ *Arrest Warrant of 11 April 2000 (Congo v Belgium)* [2002] ICJ Rep 3 [56].

¹⁴⁹ *Reydam* (n 137) 6: designations such as crime under or against international law, universal offence, or delictum juris gentium.

asserted'.¹⁵⁰ The categorisation of international crimes ranges from only recognising “core crimes” to the inclusion of crimes such as terrorism, narcotics trafficking, slave trade, sabotage of civilian aeroplanes, and state-sponsored disappearances.¹⁵¹ With that being said, one could conclude that the debate over the definition or scope of the acts covered by international crime does not necessarily deprive the offence of its universal character; for instance, whilst piracy was for a long time considered an international crime, its exact definition was not settled in practice.¹⁵²

On the basis that, under international law, actions of States (and their nationals) are legal unless they are prohibited, and to demonstrate the existence of international crimes, one has to establish a dual responsibility for crimes under customary law. The two necessary factors in the creation of international law are its prohibition in international law both for individuals and States (the obligation to prevent the commission of the crimes and prosecute alleged offenders). The binding *usus* for the prohibition of an act for individuals and States can be extracted from international treaties (as binding *usus* if there is consensus) and its prohibition in the domestic laws of States and their internal practice. These two main factors are proposed on the basis that any legal consequence which arises for the offenders affects both the States and the individuals involved.

First, this is on the basis that international crimes primarily create obligations for individuals as the Nuremberg Tribunal stated that international crimes ‘are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the

¹⁵⁰ Gene Bykhovsky, ‘An Argument Against Assertion of Universal Jurisdiction by Individual States’ (2003) 21 Wis Int’l LJ 161, 166.

¹⁵¹ Christopher L Blakesley, ‘Extraterritorial Jurisdiction’ in M Cherif Bassiouni (ed), *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*, vol 2 (Brill 2008) 27.

¹⁵² Michael P Scharf, ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position’ (2001) 64 LCP 67, 81.

provision of international law be enforced'.¹⁵³

Secondly, the reference to the punishment of individuals as the Nuremberg Tribunal noted is important since an act cannot gain the status of a crime without legal repercussions for individuals, whether it is in international law or domestic law. A positivist view entails that there should be neither crimes nor punishment unless positive international law proscribes the acts or omissions.¹⁵⁴

Thirdly, the exercise of enforcement jurisdiction over alleged offenders of international crimes raises another question: whether the rights and obligations of the State whose official/national is prosecuted will be affected. For instance, prosecution by a foreign court raises the question of immunities and jurisdiction, which are both primarily owed to the State under international law, rather than the individual. The rights and obligations of a State in respect of immunities cannot be affected in international law unless the State breaches its obligations under international law in respect of international crimes. Thus, this chapter considers whether there are rules of customary law creating obligations for both States and individuals in respect of international crimes.

That said, the concept of individual criminal responsibility or recognition of international crimes in international law is generally tied to one or more of the following factors: the gravity of the offence, the means of enforcement¹⁵⁵ (ie prosecution in international

¹⁵³ *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22* (British Government 1950).

¹⁵⁴ Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Brill Nijhoff 2012) 36.

¹⁵⁵ M Cherif Bassiouni, 'The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights Symposium--Security of the Person and Security of the State: Human Rights and Claims of National Security' (1982) 9 *YaleJWorld PubOrd* 193, 195–62; Theodor Meron, 'Is International Law Moving Towards Criminalization?' (1998) 9 *EJIL* 18, 24; Quincy Wright, 'The Scope of International Criminal Law: A Conceptual Framework' (1974) 15 *VaJInt'l L* 561, 562–63; Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg* (2nd edn, OUP 2009) 13; Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 10.

tribunals¹⁵⁶), associating crimes with rules intended to protect values considered important by the whole international community¹⁵⁷, associating crimes with violations of customary law which emanate from treaties or are clarified by treaties¹⁵⁸, and finally associating international crimes with their legal consequences (ie the rules of immunity and universal jurisdiction)¹⁵⁹.

Cassese refers to *values* mainly as humanitarian considerations, which could be derived from international instruments.¹⁶⁰ It is not justifiable to differentiate between community interests and customary law on the basis that customary rules represent the interests of the international community either based on self-interests or the legitimacy of the norms. The categorisation of crimes based on community interest in isolation of customary rules is unnecessary. If the intention is to differentiate between rules based on the self-interests of States and rules based on legitimacy, then custom cannot distinguish between either.

On the basis of the conditions above (except for the gravity of the offence and prosecution in an international tribunal), Cassese concludes that piracy is not an international crime.¹⁶¹ This is not because piracy does not give rise to universal jurisdiction or the fact that piracy is established as a crime under customary law but because the prohibition of piracy does not protect *values* considered important by the international community as a whole.¹⁶²

However, the proscription of piracy was ‘due to nations’ commonality of interests in securing themselves from the perils of piracy’,¹⁶³ ie the protection of international trade, as

¹⁵⁶ Ratner and Abrams (n 155) 11.

¹⁵⁷ Antonio Cassese, *International Criminal Law* (OUP 2003) 23–5; Ferdinandusse (n 155) 10–6.

¹⁵⁸ Cassese (n 157) 23–5; Ferdinandusse (n 155) 12–6.

¹⁵⁹ Cassese (n 157) 23–5: That the international community has an interest to suppress these crimes (ie ‘the alleged authors may in principle be punished by any State regardless of any links’) and, finally, immunity *ratione materiae* is not available to international crimes; Ferdinandusse (n 155) 10–6.

¹⁶⁰ Cassese (n 157) 23.

¹⁶¹ *ibid* 23–5.

¹⁶² *ibid*.

¹⁶³ M Cherif Bassiouni, ‘The History of Universal Jurisdiction and Its Place in International Law’ in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious*

shipping was the main method of transport in that era. Piracy could, under the law of nations, be ‘tried and punished in the court of justice in any nation, by whomsoever and wheresoever committed’.¹⁶⁴ This could be interpreted as internalisation to the second degree (one which is based on self-interests rather than the legitimacy of the norms); nonetheless, there is a consensus regarding its illegality in international law as a rule of customary law. The fact that it is based on the accumulation of self-interests or purely on the legitimacy of the norms as protecting the higher values of the community does not render the legal status of the crime of piracy any less than other crimes under customary law.

With respect to the gravity and systematicity criteria for recognition of international crimes, Sunga, argues that a ‘general rule’ has evolved in international law, creating individual criminal responsibility for ‘serious violations of human rights’.¹⁶⁵ Similarly, Ratner and Abrams divide crimes which give rise to individual responsibility into two categories: acts which must take place in a certain context against a particular group in a *systematic manner*; and specific offences, such as slavery, forced labour, or forced disappearance, which are criminal regardless of the circumstances.¹⁶⁶ Ratner and Abrams maintain that international criminal law in respect of identifying individual criminal responsibility has adopted an approach which ‘is characterised by the *directness* and *gravity* of their assault upon human person, both corporeal and spiritual’.¹⁶⁷

Associating the crimes or their legal consequences (ie the existence of universal jurisdiction) with the gravity or seriousness of the violations or with other factors of this nature cannot in general justify instances when crimes under different categories give rise to similar

Crimes Under International Law (University of Pennsylvania Press 2003) 48; Henry Wheaton, *Wheaton’s Elements of International Law* (Coleman Phillipson ed, 5th edn, Stevens 1916) 192.

¹⁶⁴ Ferdinandusse (n 155) 17.

¹⁶⁵ Sunga (n 154) ch VII; Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (2nd edn, Springer 2013) 70–1.

¹⁶⁶ Ratner and Abrams (n 155) 14, emphasis added.

¹⁶⁷ *ibid* 13.

legal effects. For instance, a crime not as grave as genocide, such as kidnapping, also gives rise to universal jurisdiction. The proposals to reach a consensus on the gravity of offences (or whether they are carried out in a systematic manner) are too varied and fail to provide a comprehensive framework for studying international crimes and their legal effects. More importantly, they are generally partially oblivious towards the role of the status of crimes in international law and their legal effects.

The categorisation of acts as international crimes on this basis cannot be fully justified, as the categorisation of acts as international crimes should be based on their status in international law. The existence of a doctrine of the definition of crime on the basis of scale and systematicity has also been doubted as a rule of customary international law in the literature.¹⁶⁸ More generally, the problem with such categorisations is that they generally also fail to provide a convincing account of the interaction of international crimes with other rules of customary law.

The gravity or systematicity of offences could, however, influence the internalisation and institutionalisation of these norms by States. A crime such as genocide or crimes against humanity, once introduced into the legal and political discourses, can influence actors to internalise these norms more rapidly because of their perceived legitimacy. Once a crime has reached the status of a crime in international law, its legal effects should be identifiable by its status as an international crime in customary law, rather than the factors which propelled it to reach that status, or non-legal factors such as the level of the internalisation of the norm by States (whether States have adopted the norms purely on the basis of self-interests or because of its legitimacy).

In a similar vein, the prosecution of offenders in an international tribunal such as the

¹⁶⁸ Bykhovsky (n 150) 167.

ICC (most States are party to the Rome Statute¹⁶⁹) could be considered as a compelling factor, indicating consensus of the international community regarding the status of proscribed conducts as international crimes. The inclusion of the crimes against humanity and war crimes in the Statutes of the IMT and IMTFE, which found numerous legal precedents in international law prior to their inclusion in these Statutes¹⁷⁰, provided a more compelling justification for the claim of the customary status of these crimes.

By the same token, the inclusion of the crime against peace in the Statutes of the post-World War II tribunals could be considered as a factor merely contributing to the customary status of the crime against peace, taking into account that the customary status of the crime of aggression was disputed,¹⁷¹ ie the status of the crime of aggression as an international crime is currently under dispute. Accordingly, the inclusion of prohibited conducts in the statute of an international tribunal cannot necessarily be an indicator of the status of an act as a crime in customary law as the example of crimes against peace in the Statutes of the IMT¹⁷² and the ICC¹⁷³ illustrates.

Factors such as gravity, systematicity of crimes, prosecution of offenders in ad hoc criminal tribunals, and the exercise of universal jurisdiction¹⁷⁴ by States, may persuade States that have not internalised these values to uphold and internalise such values more rapidly, which may eventually lead to the creation of custom. For instance, the commission of mass

¹⁶⁹ ‘The State Parties to the Rome Statute’ (*The International Criminal Court*, 23 August 2016) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

¹⁷⁰ Thomas Weigend, “‘In General a Principle of Justice’ The Debate on the “crime Against Peace” in the Wake of the Nuremberg Judgment’ (2012) 10 JICJ 41, 46–8.

¹⁷¹ *ibid* 47.

¹⁷² *ibid* 41–4; Michael P Scharf, ‘Universal Jurisdiction and the Crime of Aggression’ (2012) 53 HarvInt’l LJ 357, 374–76; Egon Schwelb, ‘Crimes against Humanity’ (1946) 23 BYBIL 178, 208–9: argues that Nuremberg was an international tribunal.

¹⁷³ See next section.

¹⁷⁴ Ferdinandusse (n 155) 10–6.

atrocities by a State followed by prosecution of perpetrators in an international or regional tribunal would be strong persuading factors for actors that have not yet internalised such values.

The higher legitimacy attributed to prosecutions by regional and international tribunals coupled with the conceived higher morality attributed to the prohibition of large scale and systematic offences will naturally lead to a more rapid internalisation of these offences by States. Morality is a contributor to the legitimacy of any claim¹⁷⁵. The immorality of grave and systematic offences by legal authorities are, for instance, expressed as offences shocking the conscience of mankind¹⁷⁶ and as those posing a danger to the foundation of international legal order and the international society¹⁷⁷. Additionally, the prosecution in international or regional courts not only illustrates a form of consensus, at least among some States regarding the legitimacy of their prohibition it more importantly provides a symbolic validation and pedigree for the prohibition of such offences¹⁷⁸.

In this respect, social internalisation of offences by States which still have not adopted these values will ultimately elaborate itself in the domestic laws of the States concerned. Accordingly, more States will promulgate laws to proscribe such offences which will, in turn, reinforce or give rise to the customary status of such offences as crimes proscribed for both States (to prevent and prosecute) and individuals at least on a domestic level. Factors such as gravity and systematicity may lead to rapid socialisation of States in respect of adopting a certain value (international crime) but cannot be the sole indicators regarding the status of an act as a crime in customary law.

¹⁷⁵ Ian Clark, *Legitimacy in International Society* (New edn, OUP 2007) 207.

¹⁷⁶ *Prosecutor v Anto Furundzija* (n 54) [153–54, 170]; Antonio Cassese, ‘Reflections on International Criminal Justice’ (1998) 61 MLR 1, 10; *Regina v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* (House of Lords) (24 March 1999) [2000] 1 AC 147, 119 ILR 136, Lord Millet at 275, Lord Browne-Wilkinson at 198, Lord Millet at 275.

¹⁷⁷ ILC, ‘1996 Draft Code of Offenses Against the Peace and Security of Mankind’ (1996) 51 UN GAOR Supp. (No 10) at 14, UN Doc A/CN.4/L.532, corr 1, corr 3, commentary to art 4 para 1.

¹⁷⁸ Franck (n 27) 94–6.

Moreover, the identification of international crimes is intended to clarify their consequences rather than the other way around. The legal consequences attached to a certain category of acts, and in this case international crimes, may undergo change. For instance, assuming that personal immunity should be upheld in respect of international crimes, there is the possibility that a rule of customary law will develop to create an exception to the personal immunity of officials. The assertions that functional immunity may not be available to offenders of international crimes or that States are entitled/obliged to exercise universal jurisdiction could be categorised as legal consequences of crimes in international law.

In the period between the Second World War and the establishment of the ad hoc tribunals by the UNSC, most prosecutions of international crimes were based on jurisdictional bases other than universal jurisdiction but, at the same time, there was a slow but gradual reliance on universal jurisdiction by States.¹⁷⁹ The development of international crimes in customary law is only *partially* dependent on the prosecution by national courts on the basis of universal jurisdiction as these prosecutions illustrate the existence of a consensus among States regarding the individual responsibility for the prescribed conducts and States' recognition of their responsibility to prevent and prosecute the alleged offenders. If States prosecute offenders on the basis of universal jurisdiction it can be argued that they have accepted the responsibility to prevent and prosecute offenders when the crime(s), offender(s) and victims all concern the same State¹⁸⁰.

The exercise of universal jurisdiction for the violation of international crimes by a foreign State not only regards State practice as binding *usus* but also affects the culture of the State system, which, in turn, affects the internal social structure of States. Accordingly, the

¹⁷⁹ Mitsue Inazumi, *Universal Jurisdiction in Modern International Law* (Intersentia 2005): see generally chs 2 and 3.

¹⁸⁰ Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 652–72: There are exceptions to this rule see Appendix (eg Financing of Terrorism Convention).

prosecution in international and ad hoc tribunals, and the exercise of universal jurisdiction by States could both transform the culture of the State system regarding recognition of an act as an international crime; that is for States which have not yet internalised those norms. They could also be indicative of the existence of consensus regarding the status of an act as an international crime when most States have internalised these values. That said, the creation of international crimes is not solely dependent on the prosecution in international courts or the exercise of universal jurisdiction by States.

The definition of crime in international law is ambiguous in the sense that it is not clear whether international crime entails the highest common denominator or lowest common denominator amongst prohibited conducts in international law to be considered as crimes. As the discussion in this section illustrated, some scholars link international crimes with the legal consequences which may follow commission of international crimes (eg inapplicability of immunities) or the seriousness and the gravity of the conducts.

The lowest common denominator of an act as a crime in international law is the acknowledgment of individual criminal responsibility for a proscribed conduct and the obligations of States to prevent the commission of the crime and prosecute the offenders rather than guaranteeing enforcement of breaches of international crimes, the seriousness of the conducts, or the legal consequences, which may follow the commission of international crimes by offenders (eg inapplicability of immunities). An international criminal tribunal such as the ICC also provides for an international enforcement mechanism. Accordingly, it goes further than the lowest common denominator required for the recognition of an act as an international crime¹⁸¹.

In that respect, the definition of crimes in international law does not necessarily include

¹⁸¹ UNGA, Rome Statute of the International Criminal Court, 17 July 1998 (last amended 2010) arts 12,13 and 17: Also, see Chapter 3 Section 3.2.

the criterion of prosecution before international tribunals and is independent of the gravity or systematicity of the offence. Accordingly, the use of the term *international crimes* in this thesis is wider as it includes a broader range of crimes than those only prosecuted in international tribunals and is limited to the dual responsibility of States and individuals.

3.4. International Crimes

Crimes under international law (ie duty to prevent and prosecute) can be established by custom, treaty or both¹⁸². Taking into account the findings of this chapter, the interests of the community could be extracted from treaties, which could also be considered as a form of State practice.¹⁸³ Accordingly, one can argue that a treaty which is a form of State practice and which is further supported by other indicia of State practice can give rise to customary law (Section 2.4). International crimes as defined in this thesis are crimes which give rise to the dual responsibility of States and individuals. Hence, the treaty and other indicia of State practice (Section 2.4) should illustrate the consensus of States over creating individual responsibility of the individual within States and States' obligations to prevent and exercise criminal jurisdiction over offenders.

Accordingly, if most States are signatories to a treaty, which establishes a system that goes further than the mere illegality of an act and establish individual responsibility and obliges States to prevent the commission of the crime and prosecute offenders, this treaty has a strong claim to represent State practice. For instance, treaties which only enshrine aspirational norms (for instance the ICCPR¹⁸⁴) or merely recognise the illegality of an act without creating the dual responsibility of States and individuals cannot represent a strong claim as State practice

¹⁸² Lee A Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations' (1998) 39 VaJInt'l L 425, 436.

¹⁸³ *Peters v Davison* [1999] 2 NZLR 164; *Fang and Others v Jiang Zemin and Others* (New Zealand High Court) (2006) 141 ILR 702.

¹⁸⁴ International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 1966.

regarding crimes as defined in this thesis. The customary status of the crimes under that treaty could only be confirmed if the dual responsibility is supported by *further* State practice indicating *consensus* (as it was argued that consensus was the main factor in the development and ascertainment of custom) in the international community. Domestic criminalisation of the proscribed conducts and measures adopted by States internally to prevent the commission of the prohibited conducts as State practice can illustrate consensus among States.

On the other hand, in respect of the duty to prevent and prosecute, if most States have criminalised an act before its prohibition under international law, then its institutionalisation in international law in a treaty may create instantaneous custom. In this way, treaties may give rise to customary rules that have already been internalised by States as values either based on self-interest or legitimacy, which would be evident, for instance, by the criminalisation of their acts in domestic law. The prohibition of torture, in this respect, is a good example, as before its promulgation in the Torture Convention, most States had prohibited torture in their domestic laws, thus, as soon as the majority of States became party to the Torture Convention, there was a strong claim as to its customary status¹⁸⁵.

Binding *usus* is a social construct and determined through consensus by way of deliberation and legal discourse prevalent in the international community, such as international or national courts and other relevant norm interpreters, such as legal scholars and the ILC. Specifically, in relation to crimes, it was noted that the ICJ and ICTY have referred to resolutions of international organisations and treaties in their annunciations of a rule of customary international law (Section 2.4). The existence of international crimes could in this way be illustrated if the act is prohibited by international law, both for individuals and States,

¹⁸⁵ *Decision on Admissibility, Dated November 23, 1989, Regarding Communications nos 1/1988, 2/1988 and 3/1988 (OR, MM and MS v Argentina)* Report of the Committee Against Torture, UN GAOR, 45th Session, Supp No 44, Annex VI (1990) UN Doc A/45/44 [111]; UNGA Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1985, entered into force 26 June 1986) 1465 UNTS 85 art 2(1).

which is evident in domestic legislation and practice, as well as international treaties and resolutions of international organisations.

The aim of this section is not to provide an exhaustive list of crimes which establish dual responsibility for States and individuals. Rather, it examines the customary status – ie the dual responsibility of States and individuals, of some of the international crimes according to a constructive understanding of custom formation. The dual responsibility of States to prevent and prosecute, and for individuals not to commit war crimes¹⁸⁶, genocide¹⁸⁷, and slavery¹⁸⁸ are well established in international law¹⁸⁹.

There are also various treaties (Appendix) which oblige States to prevent and prosecute

¹⁸⁶ Timothy McCormack, *The Law of War Crimes: National and International Approaches* (Springer 1997) 31–40; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (rev edn, CUP 2011) 24–25; G Parker, ‘Early Modern Europe’ in George Andreopoulos and Mark R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (New edn, Yale University Press 1997) 40, 52; Sunga (n 154) 20 and 31; Ratner and Abrams (n 155) 82; LC Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) 18–51; Ratner and Abrams (n 155) 82–93; Claus Kreß, ‘Reflections on the *Iudicare* Limb of the Grave Breaches Regime’ (2009) 7 JICJ 789, 792; Egon Schwelb, ‘Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission’ (1967) 61 AJIL 946, 946–75; Georg Schwarzenberger, ‘International *Jus Cogens*’ (1964) 43 TexLRv 455, 96; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Reissue edn, CUP 2010) 69–72.

¹⁸⁷ UNGA Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1949) 78 UNTS 277 art 4; *Attorney General of the Government of Israel v Adolf Eichmann* (District Court of Jerusalem) (1961) 39 ILR 5 [10, 39]; Affirmation of the Principles of International Law Recognised by the Charter of Nurnberg Tribunal, UNGA Res 95(I) (11 December 1946) (adopted unanimously); Theodor Meron, ‘International Criminalization of Internal Atrocities’ [1995] AJIL 554, 558; *Jorgic* (Germany, Federal Constitutional Court) 135 ILR 152 [165]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [1996] ICJ Rep 595 [31]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [442].

¹⁸⁸ Gudmundur Alfredsson, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Springer 1999) 104; Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 132–33; Ratner and Abrams (n 155) 110; Sunga (n 154) 86–87 and 92; Wheaton (n 163) 200–2; Convention to Suppress the Slave Trade and Slavery, Sep 25, 1926, 60 LNTS 253 arts 2, 3 and 6 (123 signatories) obligates state parties to prevent and suppress the slave trade and prosecute offenders; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3 arts 2 and 3 (99 signatories); The Declaration Concerning the Slave Trade and the Operations Which on Land or Sea Furnish Slaves to the Trade (The 1885 General Act of Berlin).

¹⁸⁹ Beatrice I Bonafe, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff 2009) ch 1.

(ie to criminalise and establish jurisdiction over them) and establish individual responsibility on the national level in international law¹⁹⁰. The ICJ in *Belgium v Senegal* noted the obligations of a State under the Torture Convention to establish the (universal) jurisdiction of its courts over the crime of torture as a necessary precondition for enabling a preliminary inquiry and for submitting the case to its competing authorities for the purpose of prosecution¹⁹¹. The ICJ further noted that ‘the obligation to criminalise torture and establish its jurisdiction over it finds its equivalent in the provisions of many international conventions’.¹⁹²

The ICJ declared that the obligation to prosecute under the Torture Convention, which is based on a similar provision in the Convention for the Suppression of Unlawful Seizure of Aircraft, obliges the State to submit the case to its competent authorities.¹⁹³ The obligation to prosecute along with the preceding obligations to criminalise and establish jurisdiction over torture under the Torture Convention are similar to the obligations of States under various international conventions enumerated in the Appendix.

These conventions do not necessarily create individual responsibility directly, yet the indirect effect of these conventions is that they entail individual responsibility on the domestic level, as they require States to exercise jurisdiction over the proscribed acts. Accordingly, the reference to individual responsibility is different from the term ‘individual responsibility’ used to refer to crimes which may also be prosecuted in international tribunals¹⁹⁴.

The majority of States are signatories to the treaties and that these treaties create a responsibility for States to prevent the commission of the offence and prosecute the alleged offenders for the proscribed conducts and to give rise to individual responsibility on a domestic

¹⁹⁰ Ratner and Abrams (n 155) 11.

¹⁹¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422 [74]; Torture Convention (n 185) arts 5(2), 6(2) and 7(1).

¹⁹² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 191) [75].

¹⁹³ *ibid* 90.

¹⁹⁴ Ratner and Abrams (n 155) 11.

level (Appendix). Due to the obligations arising from these treaties and the fact that most States have also criminalised these crimes in their domestic legislations,¹⁹⁵ there is a strong claim to the emergence of consensus regarding these offences in the international community in respect of establishing a dual responsibility for States and individuals. Domestic criminalisation of prohibited conducts under international law has been recognised as an essential element in recognition of customary status of crimes.¹⁹⁶ The claim of the customary status of the obligation of States to prevent and prosecute is stronger in relation to the States which have a link to the offence¹⁹⁷.

The UN Convention on the Law of the Sea¹⁹⁸ in contrast to the conventions mentioned in Appendix only *entitles* States to seize ships or aircrafts taken by pirates and entitles those that have seized the vessel taken by pirates to arrest/prosecute.¹⁹⁹ The explanation for piracy as an international crime, which only gives rise to individual criminal responsibility is based on the fact, that no State has jurisdiction in international waters. In customary international law, it is the flag State which has the sole penal jurisdiction over most acts committed on board its

¹⁹⁵ Panama: Criminal Code (Law No 14) 2007 art 19; Australia: Act No 12 of 1914, Crimes Act 1914 Vol 2, 29 October 1914 ss 52, 53(2); Australia: Crimes (Ships and Platforms) Act 1992, Act No 193 (1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation) s 5; Australia: Criminal Code Act 1995 Act No 12 of 1995 (as amended 19 April 2011) ss 274.2(5), 268, 117(1), 101; Austria: Criminal Code (1974, amended 2013) s 64; Finland: Criminal Code (39/1889, amendments up to 927/2012 included) ch 1 and ch 11 s 7 ; France: Code of Criminal Procedure 2011 art 698(1)-(9); Spain: Judicial Power Organisation Act 1985 (LOPJ 1985) (as amended 2009) 23(4)(a)-(h); Italy: Criminal Code of the Republic of Italy (amended in 2011) art 7 and 7(5); Belgium: Code of Criminal Procedure 2006 arts 1 bis and 12 bis; Canada: Criminal Code RSC, 1985, c C-46 ss 7(1), 2.01, 2.1-2, 2.21, 3, 3.1, 3.71, 3.7(3)-(5); Criminal Justice Act 1988, c 33 s 134.

¹⁹⁶ Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 ILQ 153, 560–61.

¹⁹⁷ Cryer (n 186) 102, 109.

¹⁹⁸ UNGA Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (167 Parties) (UN Convention on the Law of the Sea) art 105; 1958 Geneva Conventions on the Law of the Sea (29 April 1958) 450 UNTS 11 art 19.

¹⁹⁹ Wheaton (n 163) ss. 122-24, 194: for historical background on the right to punish offenders; Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2006) 47; Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law' (n 163) 47–8; Hans Kelsen, *Peace Through Law* (Lawbook Exchange 1944) 76.

ships on the high seas.²⁰⁰ It is inconceivable to create an obligation for States to prevent acts of piracy since pirates operate in a territorial vacuum -over which no State has exclusive jurisdiction, until the moment they board a ship.

Judge Moore in *Lotus* alluded to this fact and stated that,

as the scene of the pirate's operation is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish...²⁰¹

Similarly, Grotius considered the application of universal jurisdiction to piracy as an extension of the territoriality principle: if a ship did not carry a flag of any State, there was a vacuum in relation to who could exercise universal jurisdiction, and every State had the right to exercise universal jurisdiction.²⁰² Thus, for the crime of piracy, it is a prerogative and States are not under any obligation to exercise their prerogative to prosecute the offenders or prevent acts of piracy on the high seas.

Accordingly, the criterion of the State's obligation to prevent and prosecute does not apply to the crime of piracy. The factual difference that piracy can only occur on the high seas should not affect the legal status of the crime of piracy in international law. Moreover, the controversy over the classification of acts as international crimes is almost exclusively related to their legal consequences regarding rules on the jurisdiction of States under international law and the rules of immunities of officials. As the evolution of the crime of piracy in international law was solely dependent on its legal consequence, namely, universal jurisdiction, piracy can also be categorised as an international crime.

²⁰⁰ Byers (n 34) 102.

²⁰¹ *Lotus* (n 127) 70.

²⁰² Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law' (n 163)

In addition, with respect to the crime of enforced disappearance (as an isolated act and distinct from enforced disappearance under crimes against humanity²⁰³), it must be noted that most States have not ratified the Enforced Disappearance Convention. There are two arguments which support the customary status of the crime of enforced disappearance – ie the dual responsibility of States and individuals under customary law. The first argument is that the act of enforced disappearance could also be viewed as a crime of torture.²⁰⁴ Secondly, the fact that almost half of the States in the world are signatories to the Enforced Disappearance Convention should be viewed in light of Article 18 of the Vienna Convention on the Law of Treaties, which obliges signatory States to refrain from acts which would defeat the object and purpose of the treaty.²⁰⁵

The second argument is also supported by the fact that the UN Declaration on the Protection of All Persons from Enforced Disappearance provides that States shall not practise, permit or tolerate enforced disappearance and that States shall take effective measures to prevent and terminate acts of enforced disappearance.²⁰⁶ The second argument should also be viewed in the context that many States have prohibited enforced disappearance in their domestic legislations.²⁰⁷ The claim here is not that a consensus has emerged with respect to the crime of enforced disappearance, but merely that there is strong evidence to that effect.

²⁰³ For instance, see art 7(1)(i) of the ICC Statute (n 181).

²⁰⁴ Kirsten Anderson, 'How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance' 17 *MelbJInt'l L* 245, 261–65: Also see the shortcomings of this approach.

²⁰⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 18(a).

²⁰⁶ UN Declaration on the Protection of All Persons from Enforced Disappearance (18 December 1992) A/RES/47/133 arts 2 and 3.

²⁰⁷ Panama: Criminal Code (n 195) art 19 crimes against humanity, enforced disappearance, crimes committed against the legal personality of the states, crimes against the national economy of Panama, falsification of official documents and drug trafficking and under art 21 Panama courts have jurisdiction over international crimes enshrined in treaties; Australia: Criminal Code 2011 (n 195) art 268(21); Germany: Code of Crimes Against International Law or CCAIL (entered into force on June 30, 2002) ss 1, 6, 7, 8-12, Organization of American States, Inter-American Convention on Forced Disappearance of Persons, 9 June 1994 has 15 state parties.

Moreover, there are claims that the duty to prosecute most international crimes, especially with regards to crimes against humanity²⁰⁸, crimes against peace (crime of aggression) and apartheid have not been established in customary international law²⁰⁹. The status of these crimes as customary rules establishing dual responsibility for States and individual are considered individually.

Despite the fact that there is support for the customary status of the crimes against peace²¹⁰ by authoritative sources, commentators generally disagree on its status as customary law. The customary status of the crime of aggression is generally tied to the prosecutions of the post-World War II tribunals and military courts.²¹¹ This is supported by the contention that the principles of the Nuremberg Charter and judgments as a result of the General Assembly Res 95(i) are declaratory of customary international law.²¹² Accordingly to these commentators the claim is not that its prohibition in customary law arises from treaty law or that its prohibition is supported by criminalisation in domestic legislations.

Apart from the statutes and judgments of the post-World War II tribunals²¹³, the Treaty

²⁰⁸ Michael P Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti Symposium on Humanitarian Intervention and International Justice' (1996) 31 *TexInt'l LJ* 1, 28.

²⁰⁹ Ferdinandusse (n 155) 12–13.

²¹⁰ Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement') (8 August 1945) art 6 (a); Charter of the International Military Tribunal for the Far East (19 January 1946) art 5(a); UNGA Res 95(I) (n 187): unanimously affirmed the principles from the Nuremberg Charter and judgments; UNGA Res 3314 (XXIX) Definition of Aggression (14 December 1974) art 5; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625(XXV) (24 October 1970): provides that a war of aggression constitutes a crime against peace for which there is State responsibility; 34 *Barcelona Traction, Light and Power Company (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 [34]; *Regina v Jones (Margaret) and Others* [2006] UKHL 16, paras 12–19, 44, 59, 96–97, 99; *United States of America v Ernst von Weizsäcker* (11–13 April 1946) United States Military Tribunal 319; May Larry May, *Aggression and Crimes Against Peace: Philosophical and Legal Aspects of War and Conflict* (CUP 2005) 3; Whiteman Marjorie M Whiteman, 'Jus Cogens in International Law, with a Projected List' (1977) 7 *GaJInt'l& CompL* 609, 626.

²¹¹ Scharf, 'Universal Jurisdiction and the Crime of Aggression' (n 172) 369–72.

²¹² *ibid.*

²¹³ Noah Weisbord, 'Prosecuting Aggression' (2008) 49 *HarvInt'l LJ* 161, 164–65.

of Versailles²¹⁴ and Code of Crimes against the Peace and Security of Mankind²¹⁵ are also used as evidence supporting the customary status of the crime of aggression. The problem with reliance on the Treaty of Versailles is not only that Kaiser was not prosecuted²¹⁶ but also that the definition of aggression in the Treaty of Versailles does not correspond to the generally recognised definition of aggression.

The crime of aggression is generally recognised as acts of war in violation or without justification under international law²¹⁷ by high-ranking officials²¹⁸ (ie ‘by a person in a position effectively to exercise control over or to direct the political or military action of a State’²¹⁹). Whereas, Article 227 of the Treaty of Versailles only related to the prosecution of Kaiser and was also limited to ‘supreme offences against international morality and the sanctity of treaties’²²⁰ rather than acts of war in violation of international law. More broadly, pre-Nuremberg sources on the crime of aggression were ambiguous on ‘whether aggression would involve individual responsibility, State responsibility, or both’.²²¹

Similarly, the Code of Crimes against Peace and Security of Mankind does not claim that the crime of aggression is a customary rule; rather it merely states that it is a rule of international law, which gives rise to individual responsibility²²². In this sense, one can maintain that the crime of aggression is not a crime under customary law, but rather it is one

²¹⁴ Treaty of Peace between the Allied and Associate Powers and Germany (28 June 1919) 225 Consol TS 188 (Treaty of Versailles) art 227.

²¹⁵ UN GAOR, 51st Sess, Supp No 10 (July 26, 1996) UN Doc A/51/10 arts 2 and 16.

²¹⁶ Benjamin B Ferencz, ‘From Nuremberg to Rome: A Personal Account’ in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2006) 31.

²¹⁷ Scharf, ‘Universal Jurisdiction and the Crime of Aggression’ (n 172) I.A.

²¹⁸ Keith A Petty, ‘Sixty Years in the Making: The Definition of Aggression for the International Criminal Court’ (2008) 31 *Hastings Int’l & Comp L Rev* 531, 547; ICC Statute (n 181) art 8 *bis* (1).

²¹⁹ ICC Statute (n 181) art 8 *bis* (1).

²²⁰ Treaty of Versailles (n 214) art 227.

²²¹ Weisbord (n 213) 163.

²²² ILC, ‘1996 Draft Code of Offenses Against the Peace and Security of Mankind’ (n 177) 43 para 4.

which can be prosecuted in an international tribunal such as the ICC when the State parties have accepted or ratified the crime of aggression or through referral by the UN Security Council (UNSC)²²³.

Against this background one should also consider that, the element of State practice, that is, its criminalisation under the domestic law of States before the adoption of the ICC Statute in 2001 and the agreement on its definition in 2010 by the Assembly of the States Parties, was not present in international law. The only exceptions are prosecution by military tribunals of a few States²²⁴ post-World War II on the basis of the Control Council Law No 10²²⁵.

Prior to 2010, some States, which had enacted implementing legislations, excluded the crime of aggression from the ambit of their domestic implementing instruments or were silent on its application²²⁶. On the other hand, States that had included the crime of aggression in their domestic instruments had made the applicability of the crime of aggression subject to the agreement on its definition²²⁷ according to the ICC Statute²²⁸. However, the ICC only has jurisdiction over the crime of aggression in respect of the States Parties which have accepted or ratified the 2010 amendment to the Rome Statute²²⁹. For instance, Australia and Kenya²³⁰ have not accepted or ratified the 2010 amendment to the ICC Statute²³¹, and accordingly, their

²²³ ICC Statute (n 181) arts 121 (3)-(5), 125, 12(a)-(b), 13(b), art 15 *bis*,.

²²⁴ Scharf, 'Universal Jurisdiction and the Crime of Aggression' (n 172) 370.

²²⁵ Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945.

²²⁶ International Criminal Court Act 2001, c 17 art 1(1); Norway: Penal Code (Chapter 16 Sections 101-110) ss 101-107; Canada: Crimes Against Humanity and War Crimes Act (SC 2000, c 24) art 6(1); Ireland: International Criminal Court Act 2006 pt 2 art 6(1).

²²⁷ Kenya: The International Crimes Act 2008, Part 2, art 5(2); Australia: International Criminal Court Act 2002, Act No 41 of 2002 as amended, Schedule 1, art 5(2).

²²⁸ ICC Statute (n 181), arts 121 and 123.

²²⁹ *ibid* arts 121(5) and 125.

²³⁰ Australia: International Criminal Court Act 2002 (n 227) pt 1 s 4 provides that 'international crime means a crime in respect of which the ICC has jurisdiction under article 5 of the Statute'; Kenya: The International Crimes Act 2008 (n 227) pt 1 s 2 (Interpretation).

²³¹ 'Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en> accessed 24 October 2016.

courts may not have jurisdiction over the crime of aggression. Courts in these States may still have jurisdiction over the crime of aggression when the ICC can assert its jurisdiction over a crime committed in the territory of a State which has accepted or ratified the amendment, when the offender is a national of a State that has ratified or accepted the amendment²³² or when the UNSC refers a situation to the ICC²³³.

At the same time, the exercise of the ICC over the crime of aggression is subject to a few restrictions. First, the ICC's jurisdiction over the crime of aggression in cases which are not referred by the UNSC is subject to the determination by the UNSC²³⁴ but when a determination has not been made within six months of an incident the prosecutor may proceed with an investigation in respect of a crime of aggression²³⁵. Secondly, States by lodging a declaration with the Registrar of the ICC can opt out of the ICC's jurisdiction over a crime of aggression²³⁶. Finally, non-ICC State Parties are exempted from the ICC's jurisdiction over a crime of aggression unless the situation has been referred to the ICC by the UNSC²³⁷.

Accordingly, on the basis of the following factors one cannot conclude that the crime of aggression even after its adoption in the Rome Statute has achieved the status of customary law: the low number of ratifications of the 2010 amendment by States²³⁸, the fact that only a few States have enacted legislations to allow their courts to exercise jurisdiction over the crime of aggression,²³⁹ and the fact that the ICC Statute does not oblige States to exercise jurisdiction

²³² ICC Statute (n 181) art 12(2)(a)-(b).

²³³ *ibid* art 13(b).

²³⁴ *ibid* art 15 *bis* (6).

²³⁵ *ibid* art 15 *bis* (8).

²³⁶ *ibid* art 15 *bis* (4).

²³⁷ *ibid* art 15 *bis* (5).

²³⁸ 'Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court' (n 231): 32 States have ratified or accepted the 2010 amendment on the crime of aggression.

²³⁹ UN Secretary-General, 'Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction' (July 29, 2010) UN Doc A/ 65/181 29.

over the crimes enshrined in its Statute²⁴⁰. This is in spite of the fact that most State Parties to the ICC (more than two-thirds²⁴¹) agreed to the 2010 amendment, and that there are legal authorities justifying the existence of a customary rule of the crime of aggression prior to its adoption in the Rome Statute and amendment in 2010.

The prohibition of apartheid finds support in the Universal Declaration of Human Rights (UNDHR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The UNDHR includes a non-discriminatory provision²⁴², and the ICERD obliges States to prevent, prohibit and eradicate practices of racial segregation and apartheid²⁴³. The Apartheid Convention obliges States Parties to adopt legislative measures to suppress, discourage, and punish the crime of apartheid²⁴⁴. Although the Apartheid Convention obliges States to prevent and prosecute, the Convention was drafted with mainly the practices of South Africa in mind²⁴⁵ and today may only be applicable in relation to the practices of the Israeli government in the occupied territories²⁴⁶.

Apartheid is also included in the Statute of the ICC concerning the element of crimes against humanity²⁴⁷. There are indications that the crime of apartheid as a rule which obliges States to prevent and prosecute has now reached a customary status. First, the inclusion of apartheid in the ICC Statute can support the status of the crime of apartheid as a customary

²⁴⁰ See Chapter 3.

²⁴¹ ICC Statute (n 181) art 121(3).

²⁴² UNGA, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art 2; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16 [129–31].

²⁴³ UNGA International Convention on the Elimination of All Forms of Racial Discrimination (adopted by GA Res 2106 (XX) on 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 3.

²⁴⁴ UNGA International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) A/RES/3068 (XXVIII), art IV.

²⁴⁵ *ibid* art II.

²⁴⁶ John Dugard and John Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory' (2013) 24 EJIL 867.

²⁴⁷ ICC Statute (n 181), art 7(j).

rule. Secondly, in spite of the fact that the ICC does not oblige States to prevent and prosecute, the implementation of the ICC Statute by States provides strong support for the customary status of apartheid. This is supported by the fact that States have an obligation to prohibit apartheid under the ICERD and prosecute offenders under the Apartheid Convention.

Thirdly, the customary evidence in relation to the obligation of States to prevent and prosecute is stronger in relation to practices of apartheid in the context of armed conflict. This is on the basis of the inclusion of apartheid in Protocol I of the Geneva Conventions²⁴⁸ as grave breaches; one can conclude that in the context of armed conflict, apartheid has a more convincing claim to be considered as a crime in customary international law. A report by Amnesty International indicates that many State are both signatories to the Additional Protocol and have criminalised war crimes in their domestic statutes²⁴⁹.

Moreover, there are numerous international legal sources in support of the duty to prevent and prosecute with respect to crimes against humanity²⁵⁰. However, not all commentators agree that States do not have a duty to prosecute international crimes including crimes against humanity under customary law²⁵¹. Generally, writers, who maintain that a duty

²⁴⁸ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I to the Geneva Conventions) art 85(4)(c).

²⁴⁹ Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World', Index IOR 53/019/2012 23–124.

²⁵⁰ *Federation Nationale des Deportés et Internés Résistants et Patriotes v Barbie* (1983-1985) 78 ILR 124; *Eichmann* (1961) (n 187); *Attorney General of the Government of Israel v Adolf Eichmann* (Supreme Court of Israel) (1962) 39 ILR 277; *In re Imre Finta*, 1994 SCR 1 701 (Supreme Court 1994)814; *Erdemovic* (Sentencing Judgment) ICTY IT-96-22-T (29 November 1996) [64–69]; Mohamed Elewa Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (2004) 5 San Diego Intl LJ 73, 73 and 114; M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*' (1996) 59 LCP 63, 68; Ratner and Abrams (n 155) 48 and 62; Bonafe (n 189) ch 1.

²⁵¹ Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 YaleLJ 2537, 2593; Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 77; Naomi Roht-Arriaza and Naomi Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress', *Impunity and Human Rights in International Law and Practice* (1995) 28–30; Naomi Roht-Arriaza,

to prosecute does not yet exist in customary law (eg crimes against humanity or offences in Appendix) rely on the non-prosecution of perpetrators of international crimes in the domestic courts of the States primarily because of amnesties granted by national authorities of the States in which the crimes were committed.²⁵² These writers ignore the fact that a large number of States have criminalised these crimes (eg crimes against humanity²⁵³) and the duty to prevent as enshrined in the conventions in the Appendix.

Merely relying on the non-prosecution of some crimes (eg torture, genocide, crimes against humanity), which are associated with gravity and systematicity and can generally only be committed by States as State policy or by individuals in a position of power and control, may not be sufficient. One may have to take a broader perspective by considering the wider practices within States to gauge a better understanding of the status of some crimes under international law.

Accordingly, the prevention of some crimes (eg genocide, apartheid and crimes against humanity, etc) and the internalisation of these crimes as prohibited conducts by States is not only dependent on its criminalisation in domestic legal systems. The prevention and internalisation of these crimes as prohibited conducts is also dependent on the nature of the political regimes in States and institutions within States, which prevent the commission of these crimes.

In this regard, one can hardly reject the idea that liberal democracies are less prone to commit crimes because of the institutions and practices in these States, which may not

‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ [1990] CLR 449, 467; Carla Edelenbos, ‘Human Rights Violations: A Duty to Prosecute?’ (1994) 7 LJIL 5, 15.

²⁵² Charles P IV Trumbull, ‘Giving Amnesties a Second Chance’ (2007) 25 Berk J Intl L 283, 288–301.

²⁵³ Amnesty International, ‘Universal Jurisdiction’ (n 249).

necessarily target any specific crime²⁵⁴. Certain values and practices (eg human rights, civil societies, robust domestic legal institutions²⁵⁵) are enshrined in the political philosophies that influence the operation of the practices and the institutions within these States, which prevent the commission of international crimes or at least reduce the likelihood of their commission. From this perspective, the claim of the customary status of the duty of States to prevent and prosecute for the crime of apartheid becomes more compelling. Conversely, the same cannot be claimed for the crime of aggression as ‘democracies are no less war-prone than other forms of government’²⁵⁶.

Writers who reject the customary status of the duty to prosecute with respect to some international crimes generally adopt a traditional understanding of custom creation by only taking into consideration inconsistent State practice (ie the number of non-prosecution with respect of international crimes).²⁵⁷ Furthermore, these writers generally underestimate the role of international and regional treaties and international resolutions in the creation of custom²⁵⁸.

In the process of finding a concrete or extensive State practice, as required by such writers for the formation of custom, even the amnesties granted by national authorities are equated with the practice of impunity, regardless of whether such amnesties are endorsed or not by the international community. From this perspective, the practice of “impunity” amounts to State practice providing support for the idea that States do not have an obligation to prosecute some international crimes under customary law²⁵⁹.

²⁵⁴ RJ Rummel, ‘Democracy, Power, Genocide, and Mass Murder’ (1995) 39 JConflict Resol 3, 25.

²⁵⁵ Andrew Moravcsik, ‘Explaining International Human Rights Regimes: Liberal Theory and Western Europe’ (1995) 1 EJIntl R 157, 157.

²⁵⁶ T Clifton Morgan and Sally Howard Campbell, ‘Domestic Structure, Decisional Constraints, and War So Why Kant Democracies Fight?’ (1991) 35 JConflict Resol 187, 188.

²⁵⁷ Michael Scharf, ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’ (1996) 59 LCP 41, 52–7; Trumbull (n 252) 29–300.

²⁵⁸ Scharf, ‘The Letter of the Law’ (n 257) 52–7; Trumbull (n 252) 29–300.

²⁵⁹ Scharf, ‘The Letter of the Law’ (n 257) 52–7; Trumbull (n 252) 290–300.

As discussed, custom can be created by consensus, and international resolutions or treaties may be considered as relevant binding *usus*. Accordingly, the creation of crimes in custom is independent of the legality of amnesties granted by national authorities under international law (Chapter 3), as one cannot argue that custom has not formed as a result of the practice of States to grant amnesties to their nationals who have committed international crimes. Even if a traditional understanding of custom formation is adopted to determine whether States have a duty to prosecute, the *opinio juris* element which is that the State must be acting under a sense of legal obligation²⁶⁰, does not necessarily support that State practice.

Most international crimes transpire in the context of civil wars within States. Accordingly, the negotiations for peace within States entangled in civil wars make it necessary for parties to offer amnesties to the individuals involved in the civil war as a bargaining tool during the process of negotiations. Against this background, any amnesty offered during peace negotiations is usually based on political necessity rather than arising out of a sense of legal obligation that States do not have a duty to prosecute offenders of international crimes²⁶¹. Alternatively, the granting of amnesties by national authorities could be seen as a breach of the duty of States²⁶² to prosecute the offenders or as an exception to the duty of States to prosecute offenders under customary law²⁶³.

²⁶⁰ *Restatement of the Law, Third, Foreign Relations Law of the United States* (American Law Institute 1987) s 102(2).

²⁶¹ Edelenbos (n 251) 21.

²⁶² On the illegality of the amnesties granted by national authorities under customary international law see Chapter 3; Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008) 251–91; Cryer (n 186) 108–9; *Lomé Accord Amnesty*, Special Court for Sierra Leone, Appeals Chamber, Lomé Accord Amnesty, SCSL 2004 15 AR72 (E) p 1236 [67].

²⁶³ On the legality of amnesties endorsed by the international community under customary international law see the following: Trumbull (n 252) 286, 298; Eugene Kontorovich, ‘The Inefficiency of Universal Jurisdiction Symposium: Public International Law and Economics’ (2008) 2008 UILLRev 389, 402–3; *ibid* 407, Subpart B: Argues that State practice supports amnesties for *jus cogens* violations; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (The New Press 2013) 292–310: The amnesties granted by the international community are to be differentiated with amnesties granted by national authorities.

The nature of the duty to prosecute international crimes under customary law is not absolute and could be qualified and made subject to certain exceptions arising from international law; ie amnesties endorsed by the international community (Chapter 3). The incorrect assumptions that proponents of a traditional understanding of custom formation have, is that the duty to prosecute offenders of international crimes must necessarily be a rule of *jus cogens* and consequently no derogation from that duty is permitted²⁶⁴. This argument follows that if there are derogations or non-prosecutions of alleged offenders, this will disprove the existence of the duty to prosecute.

First, this understanding conflates a duty to prosecute under customary law with a duty to prosecute which has achieved the status of *jus cogens*. Even if some crimes have achieved the status of *jus cogens* this by no means necessitates that all the legal elements associated with that crime have achieved the status of *jus cogens*²⁶⁵.

Secondly, obligations of States Parties to the conventions (Appendix) creating a duty to prosecute offenders may be absolute as the relevant conventions do not allow for the amnesties granted by national or even international authorities. However, outside the framework of these conventions, the duty to prosecute in customary law could recognise exceptions including the recognition of amnesties in limited circumstances, for instance, when the amnesties are endorsed by the international community. The 2008 General Comment of the Torture Committee's indicates that the "absolute duty" referred to by the Committee mainly relates to the non-commission of the crime of torture in any circumstance and irrelevance of national amnesties with respect to the crime of Torture²⁶⁶.

The duty to prosecute is not absolute as it is a customary rule rather than a rule of *jus*

²⁶⁴ Scharf, 'The Letter of the Law' (n 257) 58.

²⁶⁵ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2013) 50.

²⁶⁶ Committee Against Torture, General Comment (24 January 2008) No 2 CAT/C/GC/2.

cogens status. Accordingly, amnesties cannot necessarily be used to support the claim that States do not have a duty to prosecute offenders. Amnesties granted to individuals can be either as an exception to that duty (if endorsed by the international community) or as a breach of that duty (if only granted by national authorities) under customary law. That is, if the approach proposed here is adopted then the treaties or resolutions of international organisations, which have received the widespread support from the international community and are supported by State practice (ie prevention and criminalisation in domestic laws of States), could form customary law.

In this context, the proponents of the idea that such a duty does not exist in customary law ignore the weight of international treaties and resolutions in custom formation as a form of relevant State practice. Furthermore, they consistently ignore the weight of domestic legislations criminalising the acts prohibited by the conventions enumerated in the Appendix and other institutionalised practices in States which prevent the commission of crimes.

First, as discussed, *opinio juris* can only manifest in actions, whereas signing a treaty can amount to the relevant form of action for the purpose of custom formation as it is inherently enshrined with the belief of legality. Actions that could amount to relevant State practice for the purpose of custom formation are discerned through the prevalent discourses in the international community. Secondly, even accordingly to a traditional understanding of custom formation, domestic criminalisation of international crimes should undoubtedly manifest a higher sense of legal obligation than non-prosecution on the basis of amnesties granted for non-legal considerations.

Thirdly, a traditional understanding of custom formation requires more weight to be given to the practice of States which are involved in such acts.²⁶⁷ Accordingly, as long as there

²⁶⁷ Jeffrey Dunoff and Steven R Rattner, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (4 edition, Wolters Kluwer Law & Business 2015) 74.

are even a handful of States involved in the commission of international crimes and their rate of prosecution is low, one cannot content that such a duty exists in customary law²⁶⁸. The flaw with this line of reasoning is that it is oblivious to the fact that the majority of States have significantly diminished the likelihood of such crimes being committed in their territories in the first place. This is done through establishing governmental institutions and other practices to prevent the commission of the crimes; therefore, the need for prosecution may not even arise in those States. Accordingly, this understanding of custom formation can lead to artificial recognition of laws, which are detached from the practices and laws of the majority of States from a broader perspective²⁶⁹.

The importance of domestic legislation to criminalise and measures to prevent the commission of crimes is illustrated by the fact that such measures are in fact required by most international conventions (Appendix)²⁷⁰. On that basis, States not only have a duty to prosecute the offenders of international crimes but also have a duty to prevent the commission of international crimes²⁷¹; therefore, the institutionalisation of practices (other than criminalising the crimes in domestic laws) in States, which prevent the commission of such acts, along with the criminalisation of such acts by States, must account for relevant State practice in the formation of the customary rule of the duty to prevent and prosecute.

That being so, taking into account the large number of States that are signatories to these treaties and the fact that most States have successfully prevented the commission of the crimes and have criminalised such acts, one can conclude that there is a strong claim that a

²⁶⁸ Trumbull (n 252) 290–300.

²⁶⁹ Scharf, ‘Swapping Amnesty for Peace’ (n 208) 41.

²⁷⁰ Torture Convention (n 185) art 2(1); *OR, MM and MS v Argentina* (n 185) [111] ‘Even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture’; UNGA International Convention Against the Taking of Hostages (adopted 17 Dec 1979, entered into force 3 June 1983) 1316 UNTS 205 art 4 and para 5 of the preamble.

²⁷¹ (n 266) para 2; *Muteba v Zaire* (1984) Comm No 124/1982, 39 UN GAOR Supp (No 40) Annex XIII, UN Doc A/39/40.

duty to prevent and prosecute has been established in customary law in relation to the crimes enshrined in the international treaties (Appendix). Further, the prevalent shared understanding discerned from the judgments of national courts and international courts is that the commission of international crimes and non-prosecutions of international crimes do not amount to relevant State practice for the purposes of custom formation in respect of international crimes (Section 2.4)²⁷².

Studying rules of international law from the perspective of their status in international law illuminates the interaction between international crimes and the rules of immunities and jurisdiction. Customary law, which is part of the social structure of the State system, not only depends on the current political and environmental conditions but also on its own origin, history and internal dynamics.²⁷³ Customary law (which enshrines community interests) creates stability in the State system,²⁷⁴ which could be explained by reference to the logic of appropriateness.

The logic of appropriateness explains the internal dynamics of international law or the relationship between one norm and other norms. The standards of appropriate actions or norms are defined by prior norms,²⁷⁵ so when a norm is institutionalised in international law as customary international law, its legal effects are to be identified in light of other norms of customary law. A form of equilibrium or stability is achieved by giving recognition to other community interests which have been institutionalised in international law when identifying the legal effects of a rule of customary law. For instance, when a norm is institutionalised as an international crime, its full legal effects should be taken into account with respect to already established rules of customary law, such as immunity or jurisdiction.

²⁷² Cryer (n 186) 105–10 for more relevant State practice on the duty to prosecute.

²⁷³ Simma (n 135)

²⁷⁴ March and Olsen (n 133) 955 (institutional development); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) law as institution.

²⁷⁵ D'Amato (n 84) 102.

3.5. Jus cogens

There is a considerable overlap between international crimes developed in customary international law and *jus cogens* (eg aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture²⁷⁶). The similarity between *jus cogens* and crimes under customary law, from a constructivist perspective, could be the level of internalisation of these norms. Although the full effects of *jus cogens* are contentious, their effects vis-à-vis inconsistent treaties are generally accepted. The fact that, under Article 53 of the VCLT, a treaty (or provisions within it²⁷⁷) is annulled²⁷⁸ on the basis of its conflict with a peremptory norm and that a peremptory norm can only be modified by a subsequent peremptory norm, suggests that the resistance of these norms to change is higher, and consequently they enjoy a higher legitimacy compared to rules which have not achieved the status of *jus cogens*.²⁷⁹

The fact that *jus cogens* have high legitimacy is also supported by the opinions of various authors and other legal authorities, explained by the following terminology: ‘attack on the international legal order’ or as acts ‘which shock the conscience of mankind’, norms which represent ‘the interests of the international community’ or as ‘fundamental standards of the international community’.²⁸⁰ *Jus cogens* are also generally believed to represent the common interests of States, or the interests of the international community and arguments of the

²⁷⁶ Bassiouni, ‘International Crimes: *Jus Cogens* and Obligations *Erga Omnes*’ (n 250) 68.

²⁷⁷ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 137–38.

²⁷⁸ Theodor Meron, ‘On a Hierarchy of International Human Rights’ (1986) 80 AJIL 1, 14; Rafael Nieto-Navia, ‘International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law’, *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 18–19.

²⁷⁹ March and Olsen (n 274) see section on the logic of appropriateness.

²⁸⁰ *Prosecutor v Anto Furundzija* (n 54) [153–54, 170]; *Pinochet (No 3)* (n 176) Lord Millet at 275, Lord Browne-Wilkinson at 198, Lord Millet at 275; Whiteman (n 210) 52–53; Alfred Verdross, ‘*Jus Dispositivum* and *Jus Cogens* in International Law’ (1966) 60 AJIL 55, 322; ICC Statute (n 181) see preamble.

availability of universal jurisdiction to *jus cogens* are generally based on this assumption.²⁸¹

Although there is support for the proposition that *jus cogens* give rise to universal jurisdiction or that they represent the interests of the international community, which is also perceived as legitimate, *jus cogens* as a legal concept cannot provide a comprehensive understanding of international crimes and their legal effects vis-à-vis other rules of international law, such as the immunities of officials and rules of jurisdiction. Additionally, as discussed in Chapters 4 and 5, the concept *jus cogens* cannot provide a sound justification for their operation with respect to the immunity of officials and States due to its undetermined relationship with the sources of international law such as customary law (ie the main source of immunities).

In this respect, *jus cogens* could be explained as the institutionalisation of norms in international law which have been internalised to the third degree by States. It has already been suggested that rules of customary law are divided into two categories: rules which are based on self-interests (second-degree internalisation) and rules which are perceived as legitimate (third-degree internalisation), and it was explained that custom does not differentiate between second-degree and third-degree internalisation of norms.

However, whilst the courts of many States have recognised the existence of *jus cogens*,

²⁸¹ *Pinochet (No 3)* (n 176) Lord Millet 275, Lord Browne-Wilkinson 198; ILC, 'The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the basis of Comments and Observations of Governments' (29 July 2010) A/65/181 8; *Jorgic* (n 187) 152; *Kenya Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security and Kenyans for Justice and Development Trust (joining)* Final judgment [2011] eKLR, ILDC 1804 (KE 2011), 28th November 2011, High Court [64–9]; *Demjanjuk v Petrovsky*, 776 F 2d 571 (6th Cir 1985) 75 ILR 539 583; William J Aceves, 'Liberalism and International Legal Scholarship: The *Pinochet* Case and the Move Toward a Universal System of Transnational Law Litigation' (2000) 41 HarvInt'l LJ 129, 154; Johan D van der Vyver and Johan, 'Prosecution and Punishment of the Crime of Genocide' (1999) 23 Fordham Int'l LJ 286; *Prosecutor v Anto Furundzija* (n 54) [155–56]; Andreas Zimmermann, 'Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2012) 337–38; Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1987) 66 TexLRev 785, 830.

there is disparity between the norms accepted in international law as *jus cogens* and those recognised as *jus cogens* in these legal systems, and the legal consequences attached to norms recognised as *jus cogens*.²⁸² To be more specific, there is no recognition of a link between *jus cogens* and universal jurisdiction or the rules of immunity in the national legislations of States.²⁸³

There are three main difficulties with the concept of *jus cogens*; first, how *jus cogens* are created (ie their source in international law); secondly, their content (outside the few norms which are generally accepted as *jus cogens*²⁸⁴); and finally, the indeterminacy over the legal consequences of *jus cogens* outside the realm of treaty law.²⁸⁵ The difficulties associated with *jus cogens* stem from the fact that there is no legal method or tool associated with the identification of *jus cogens*. It is not even clear whether the legitimacy of the norms is a sufficient or necessary factor of a rule to be accepted as *jus cogens*.

Due to the inability to determine the process of their creation or source in international law, and the inability to determine their legal consequences outside the law of treaties, this study is instead primarily focused on the legal consequences of international crimes under customary law. Even if one accepts a rule has achieved the status of *jus cogens* (eg genocide), the difficulty remains in identifying the interaction of *jus cogens* rules with other rules of international law such as immunities. Thus, one has to determine whether immunities are

²⁸² Dinah Shelton, 'Introduction' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 7–8; Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (CUP 2015) see index; Switzerland: Federal Constitution of the Swiss Confederation of 18 April 1999 art 139(s); Erika de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' (2004) 15 EJIL 97, 101–3.

²⁸³ Weatherall (n 282): see annex for domestic courts' use of *jus cogens*.

²⁸⁴ Bassiouni, 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*' (n 250) 68.

²⁸⁵ Gennady M Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 EJIL 42, 64–65; Schwarzenberger (n 186) 476–78; Gordon A Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society' (1987) 28 VaJInt'l L 585; Zimmermann (n 281) 439; Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 815, 833.

perceived as legitimate or are purely based on the accumulation of the self-interests of States if this is the factor for the identification of *jus cogens*. To do that, one has to resort to non-legal considerations and take into account factors of legitimacy to determine their level of internalisation by States. This should be regarded, in the sense that legitimacy itself is not a black or white concept, and that norms enjoy different degrees of legitimacy.²⁸⁶

3.6. Can Rules of Customary Law Give Rise to Erga Omnes Obligations

It is argued that at least some rules of customary law, including international crimes under customary international law, give rise to obligations *erga omnes* on the basis of three main factors: first, that obligations *erga omnes* are owed to the international community as a whole; secondly, that all States have a legal and non-legal interest in their protection; and thirdly that there is consensus with regard to their existence.

The first condition is that all States must have a legal interest²⁸⁷ in their protection. The ICJ in *Barcelona Traction* stated that ‘in the view of the importance of these rights all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’.²⁸⁸ As discussed, all rules of customary law enshrine community interests either based on the accumulation of States’ self-interests or based on the legitimacy of the norm. This chapter illustrated how crimes are generated in customary international law, but the section on international crimes did not consider whether international crimes are based on the legitimacy or the accumulation of States’ self-interests.

The second condition is that obligations *erga omnes* are not necessarily bilateral in character but are obligations, which may or may not cause injury to another State and are owed to the international community as a whole. The ICTY has asserted that ‘the violation of such

²⁸⁶ Franck (n 27) see generally ch 3.

²⁸⁷ Ragazzi (n 26) 17, 90; Meron, *The Humanization of International Law* (n 64) 262.

²⁸⁸ *Barcelona Traction, Light and Power Company (Belgium v Spain)* (n 210) [33].

an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued'.²⁸⁹

According to this condition, an obligation under treaty or customary law could have the character of *erga omnes* obligations. An obligation of this sort under a treaty was alluded to by the ICJ in *Belgium v Senegal*. The ICJ referred to such obligations as *erga omnes partes* obligations as common interests, 'in the sense that each State party [to the Torture Convention] has an interest in compliance with them in any given case'.²⁹⁰ The ICJ also stated that 'any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*', such as those under the Torture Convention.²⁹¹ The ICJ's judgment could be read as follows: whilst the non-performance of certain treaty obligations may not necessarily negatively impact another State or other States under the treaty, any State under that treaty can invoke State responsibility of the State in breach of its obligations. Obligations *erga omnes* are owed to all of the members of the international community, as opposed to obligations under international law, which only create a right for the injured State to seek reparation.

An obligation which gives rise to *erga omnes* obligations could also have a bilateral character, for instance, with regard to a State which commits genocide²⁹² in the territory of another State. However, the example of the commission of the use of force²⁹³ as an obligation *erga omnes* suggests that the latter should not necessarily be only of a multilateral character,

²⁸⁹ *Prosecutor v Anto Furundzija* (n 54) [151].

²⁹⁰ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 191) [68].

²⁹¹ *ibid* 69.

²⁹² *Barcelona Traction, Light and Power Company (Belgium v Spain)* (n 210) [34]; *Ragazzi* (n 26) 93–103.

²⁹³ *Ragazzi* (n 26) 75–91.

but that a dimension of multilateralism is sufficient to make the obligation *erga omnes*.

The multilateralist character of (some) international rules is also alluded to in Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which notes that there is an internationally wrongful act if an act or an omission is attributable to the State under international law and constitutes a breach of an international obligation.²⁹⁴ It has been argued that Article 2 ‘departs from classical notions of State responsibility by relying almost exclusively on the consistency of the State’s conduct with its international obligations without regard to damage to other States or to fault’.²⁹⁵ The ICJ has in several cases recognised that some wrongful acts engage the responsibility of the State towards several or many States or towards the international community as a whole.²⁹⁶ The ILC, in its commentary to the Draft Articles, also recognised a broader conception of international responsibility, which was not limited to the bilateral responsibility of States.²⁹⁷

The fact that *erga omnes* obligations can give rise to obligations owed to the international community as a whole and generate a right for non-injured States suggests that these norms have a stronger claim to legitimacy than those purely based on self-interests (ie they have a multilateral dimension). In other words, these are norms which have been internalised to the third degree by most States. It has already been argued that rules of customary law can be based either on the accumulation of States’ self-interests or on legitimacy. Due to the fact that *erga omnes* obligations introduce a legal criterion which is

²⁹⁴ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) Supplement No 10, A/56/10, ILC Yearbook, 2001, vol II, Part Two.

²⁹⁵ Meron, *The Humanization of International Law* (n 64) 247.

²⁹⁶ *Barcelona Traction, Light and Power Company (Belgium v Spain)* (n 210) [33]; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90 [29]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 187) [31–2]; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 191) [68–9].

²⁹⁷ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) (n 294) 33.

capable of ascertaining legitimate norms, and the fact that international crimes also have a multilateral dimension, it could be argued that international crimes give rise to *erga omnes* obligations. The criterion of possessing a multilateral dimension is a sufficient but not necessary condition for ascertaining the legitimacy of the norms. This is on the basis that, in international law, it is difficult to justify the legal status of international crimes based on self-interests, especially when this relates to acts committed by a foreign State or its officials in its own territory on its own nationals.

It could be argued that customary rules determine the content of norms, which can be exercised against any State if a State is found in violation of them based on obligations *erga omnes*. It has been asserted that obligations *erga omnes* pertain to the legal implications arising out of a certain crime's characterisation as *jus cogens*²⁹⁸ or rules of customary law.²⁹⁹ Meron has posited that the same principle should apply to customary rules (ie they too could create an obligation owed to the international community), but acknowledges that the doctrine in this respect has moved ahead of practice.³⁰⁰

The idea that customary rules give rise to *erga omnes* obligations is not unanimous among scholars. However, within the category of rules of customary law, which give rise to obligations *erga omnes*, there has been some agreement on fundamental customary international law or general international law, which gives rise to international crimes in light of the perceived community interests they protect.³⁰¹ Meron postulated that, in *Barcelona Traction*, the ICJ 'may have intended to bestow *erga omnes* character on rights which have

²⁹⁸ Bassiouni, 'International Crimes: *Jus Cogens* and Obligations *Erga Omnes*' (n 250) 63.

²⁹⁹ Meron, *The Humanization of International Law* (n 64) 249; André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Martinus Nijhoff 2012) 27-37.

³⁰⁰ Meron, *The Humanization of International Law* (n 64) 249.

³⁰¹ *ibid* 268; ILC, 'Third Report on State Responsibility: Special Rapporteur James Crawford' (2000) A/CN.4/507 and Add 4 34 [a]; Anthony Sammons, 'The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts' (2003) 21 Berk J Intl L 111, 131-32.

matured into customary law (general international law) or have been incorporated into universal or quasi-universal instruments'.³⁰²

Moreover, the ICJ in *Belgium v Senegal* contended that the relevant provisions of the Torture Convention are similar to those of the Genocide Convention.³⁰³ As States are under no obligation to extradite or prosecute based on universal jurisdiction under the Genocide Convention and the fact that *Belgium v Senegal* involved the exercise of universal jurisdiction by Belgium, the ICJ's reference to the Genocide Convention, it could be interpreted as crimes under customary law, which give rise to obligations *erga omnes*.³⁰⁴ Thus, it could be argued that the obligations not to commit and punish genocide/torture are, under the relevant treaties, obligations *erga omnes partes*,³⁰⁵ and in customary law are obligations *erga omnes* and are owed to the international community as a whole, as most States have promulgated laws in respect of these international crimes. The ICJ emphasised that the negative impact of a breach on other States was non-essential and stated that if 'a special interest were required for that purpose, in many cases no State would be in the position to make such a claim'.³⁰⁶ Thus, if obligations of that nature can be promulgated in a treaty, there is no legal reason to suggest that they cannot develop in customary law.

This chapter has argued that international crimes create dual responsibility for States and individuals in customary law, and that the responsibility of States in customary law is the prevention and prosecution of international crimes. It was not argued that States have, under customary law, an obligation to prosecute or extradite. However, these obligations are similar

³⁰² Meron, *The Humanization of International Law* (n 64) 263; *Barcelona Traction, Light and Power Company (Belgium v Spain)* (n 210) [34] the concept of diplomatic protection.

³⁰³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 191) [68].

³⁰⁴ Genocide Convention (n 187) arts 5 and 6.

³⁰⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 191) [68–9]; Meron, *The Humanization of International Law* (n 64) 258 and 262.

³⁰⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 191) [69].

in nature based on their emphasis on the interests, which they protect and the non-requirement of an injured State to give rise to State responsibility. Moreover, in *Belgium v Senegal* the violation of the *erga omnes* obligation to prosecute or extradite did give rise to a direct right to Belgium which could be adjudicated on the basis of the Torture Convention through referral of the dispute between the parties to the ICJ.³⁰⁷ It is not contended that violation of *erga omnes* obligations give rise to a right owed to all non-injured States which could automatically be subject to adjudication in international or national courts, regardless of their procedural rules. This, however, does not negate the fact that this right, which emanates from a violation of *erga omnes* obligations, cannot be subject to enforcement or adjudication through other venues that do not require consent of the parties, as required by the ICJ procedural rules for example.³⁰⁸

The *Democratic Republic of Congo v Rwanda*³⁰⁹ and *East Timor*³¹⁰ have been cited to support the assertion that the *erga omnes* character of a norm is not sufficient basis to provide a direct right against the offending State.³¹¹ These cases are generally cited to rebut the claim that *erga omnes* can give rise to a direct claim by non-injured States. The recognition of a norm as *erga omnes*, for instance, in the *East Timor* case did not lead the ICJ to ignore the rules on the ICJ's jurisdiction, which require the consent of the parties. The ICJ's stance on *erga omnes* is not necessarily in contradiction with the obligations that certain norms of international law (eg genocide, slavery and apartheid³¹²) may create towards the international community as a whole. It must be noted that these two cases related to the jurisdiction of the ICJ and cannot be used as evidence that a rule of customary law cannot give rise to a right for a non-injured State.

³⁰⁷ Torture Convention (n 185) art 30(1).

³⁰⁸ UN, Statute of the International Court of Justice, 18 April 1946 (ICJ Statute) art 36(1)-(2).

³⁰⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* (Jurisdiction of the Court and Admissibility of the Application) [2006] ICJ Rep 6 [64].

³¹⁰ *East Timor (Portugal v Australia)* (n 296) [29].

³¹¹ Sienho Yee, 'A Call for a More Rigorous Assessment of Universal Jurisdiction' (2013) 107 ASIL PROC 242, 243.

³¹² *Barcelona Traction, Light and Power Company (Belgium v Spain)* (n 210) [33].

States can limit or delimit the jurisdiction of their courts and international courts by their constitutions and laws and intra-State jurisdictional regimes respectively. Existence of such a right in international law does not necessarily (automatically) translate into a right under domestic legal systems or the jurisdictional regimes of international courts.

It must also be mentioned that the ICJ held that States had a duty of non-recognition of *erga omnes* violations in *Namibia* – the ICJ held that the illegality of the situation was an obligation *erga omnes* and could not be recognised as lawful even by States that are not members of the UN.³¹³ In addition the ILC suggested that States had a duty of non-recognition of the Iraqi occupation of Kuwait³¹⁴. More importantly, the ICJ in *Belgium v Senegal* held that genocide could give rise to obligations *erga omnes*. Based on these examples and the discussion in Chapter 1, the following characteristics could be argued to belong to *erga omnes* obligations. First, there may be rights for States (not automatically enforceable); secondly, they may create obligations for third States; and thirdly, obligations *erga omnes* can arise from rules of customary international law; and, finally *erga omnes* obligations arise because of the multilateralist dimension inherent in some rules. For instance, the ICJ in *Barcelona Traction* stated that diplomatic immunities were not obligations *erga omnes*, justified on the basis that, in an event of a breach of diplomatic immunities, there will be an injured State and that State could reciprocate; further, the duty of non-recognition by third States does not arise due to factual circumstances.³¹⁵ In other words, it lacks a multilateralist dimension.

However, the aspect of whether *erga omnes* obligations could create obligations for third States has also been criticised. For instance, Judge Kooijmans in *Legal Consequences of*

³¹³ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) (n 294) 115 [10]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 242) 56 [125].

³¹⁴ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) (n 294) 119 [10].

³¹⁵ *Barcelona Traction, Light and Power Company (Belgium v Spain)* (n 210) [35].

the Construction of the Wall stated that he had ‘considerable difficulty in understanding why a violation of an obligation of *erga omnes* should necessarily lead to an obligation by third States’.³¹⁶ Having said that, Judge Higgins, in the same case, stated that in *Nicaragua* the ICJ had also emphasised that when ‘a binding determination [was] made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequences’.³¹⁷ This assertion is also in line with the ILC's commentary in 1982 to the Draft Articles on State Responsibility, in which it was suggested that the duty of non-recognition is engendered when a competent UN organ representing the international community as a whole recognises that an international crime has been committed.³¹⁸ Moreover, it was also suggested that States may have a *right* to adopt measures amounting to non-recognition, ‘at least pending a decision of the competent [United Nations] organ’.³¹⁹

On the basis of the explanations above, one could propose that rules of customary international law, which have a dimension of multilateralism (ie the absence of injury), can give rise to *erga omnes* obligations and generate rights for non-injured States. A breach of *erga omnes* obligations creates a right owed to a non-injured State. In terms of international crimes that create a dual responsibility for States and individuals, violation of *erga omnes* obligations gives rise to a right by foreign States to exercise universal jurisdiction over the offender.

³¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [40] Separate Opinion of Judge Kooijmans [40] at 231; also see JL Breirly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, OUP 1978) 171–73.

³¹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 316) Judge Higgins 216 [38]; citing *Military and Paramilitary Activities in and Against Nicaragua* (n 54) 117.

³¹⁸ ILC, ‘Third Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles): Special Rapporteur Willem Riphagen’ (1982) A/CN.4/354 and corr 1 and Add.1 55 and 2, ILC Yearbook 1982 Vol II (I) 48 [5], 49 [14–5]; for a general summary see Alison Pert, ‘The “Duty” of Non-Recognition in Contemporary International Law: Issues and Uncertainties’ (2012) 30 *Chin Yrbk Intl L & Aff* 58, 10–15.

³¹⁹ ILC, ‘Third Report on the Content, Forms and Degrees of International Responsibility’ (n 318) 45 [141].

4. Conclusion

This chapter argued that customary international law could be created on the basis of binding *usus* alone when there is consensus in the international community (Sections 2.1-2), which includes treaties and resolutions of international organisation (Section 2.4). This is on the basis that the desires or beliefs of States could only be portrayed in the form of actions and that distinguishing between belief and action becomes a circular task by inferring one from the other (Section 2.1). It was argued that both binding *usus* and individual rules of customary international law are determined through the discursive practices prevalent in the international community through consensus (Section 2.1). It was also argued that, since custom is based on a form of action (whether as *opinio juris* or State practice), it will comprise the interests of the international community (whether these are norms which are based on the self-interest of States or norms which are perceived as legitimate) (Sections 2.1 and 2.3). Thus, on the basis of constructivism, customary rules could be categorised in two ways: those rules which have been internalised by States only to the second degree (based on self-interests); or those rules which have been fully internalised by States (ie perceived as legitimate) (Sections 2.3 and 2.5).

This chapter contended that international crimes could be created by treaties or resolutions of international organisations when there is consensus regarding the responsibility of the State to criminalise and prevent such acts in its territory and the responsibility of individuals (Sections 2.4 and 3.3). This chapter argued that international crimes not only include the so-called “core crimes” but also include terrorism, hijacking, kidnapping and other crimes under the conventions which have received near unanimous recognition by States and establish dual responsibility for States and individuals (Section 3.3). It was argued that recognition of crimes based on their status in international law as customary rules provided a better alternative to subjecting international crimes on the basis of non-legal considerations, such as their gravity or their prosecution in international courts (Section 3.3).

It was proposed that the gravity of an act and the prosecution of crimes in international courts could, however expedite the process of their institutionalisation in international law and internalisation by States that have not internalised these norms (Section 3.3). Although the gravity of an offence may propel actors to internalise a crime more rapidly on the basis of its perceived higher legitimacy, this does not affect the legal consequences of that crime vis-à-vis other crimes under customary international law which do not enjoy the same gravity (Section 3.3). It is the status of these crimes in international law as customary rules which should be taken into account, rather than the factors shaping their creation in the social structure of the State system (ie their internalisation and their institutionalisation in international law) (Section 3.3).

International crimes giving rise to the dual responsibility of States and individuals may be created under customary law if most States become signatories to a treaty which obliges States to prevent the commission of an act and prosecutes the alleged offenders and that these obligations are followed by State practice (Section 3.4). In this respect, domestic criminalisation of the proscribed conducts, internal institutions and practices of States which prevent the commission of the crimes and the irrelevance of national amnesties granted to the alleged offenders were considered to be relevant State practice for the customary status of crimes giving rise to the dual responsibility of States and individuals. The conventions, enumerated in the Appendix, which oblige States to prevent and prosecute, and the criminalisation of the prohibited conducts in the domestic laws of States provide a strong claim to the customary status of these crimes. Furthermore, while the crime of aggression might not have achieved the status of customary law, there is stronger support for the customary status of enforced disappearance, apartheid and crimes against humanity (Section 3.4).

It was also argued that although *jus cogens* have a strong claim for the institutionalisation of fully internalised norms in international law, the reliance on the *jus*

cogens concept is not without difficulty, given it is based on an indeterminate source and that there is a lack of consensus on its content (Section 3.5). It was argued that some customary rules could give rise to obligations *erga omnes*, which include international crimes due to their multilateral dimension; in other words, States could infringe them without causing injury to any other State (Section 3.6). This chapter also argued that a breach of an obligation *erga omnes* gives rise to at least a right for non-injured States against the offending State. This could translate to a right to exercise universal jurisdiction by a non-injured State (which is based on the analogy from the ICJ's judgment in *Belgium v Senegal*) (Section 3.6). The universal jurisdiction aspect of this right is discussed in more detail in the next chapter.

Chapter Three: Universal Jurisdiction and International Crimes

1. Introduction

This chapter puts forward the case that the interpretation of international law which holds that States are permitted to do anything that is not prohibited by international law (Chapter 2 Section 3.2) similarly applies to customary international law including the rules on the exercise of jurisdiction. Its application to rules of jurisdiction would imply that States are permitted to exercise any form of jurisdiction unless prohibited by international law (eg rules of non-intervention and immunity) (Section 2.1). The prohibitive rules are not only prohibitive rules specifically targeting rules of jurisdiction but other prohibitive rules in international law, including the duty of non-intervention and the rules on immunity. Moreover, the prohibitive rules of international law apply to prescriptive, adjudicative and enforcement jurisdiction individually (Section 2.1-2). From this perspective, the role of traditional bases of jurisdiction can be balancing the rights of the States involved and preventing the violation of the duty of non-intervention (Section 2.2).

Chapter 2 argued that violations of *erga omnes* obligations, which include crimes under customary law that represent the interests of the international community, ie legitimate norms due to their multilateral dimension, create a right for non-injured States (Section 3.5).

It is contended that States are *entitled* to exercise universal jurisdiction subject to certain conditions in respect of violations of *erga omnes* obligations. Any right for States arising from the violations of *erga omnes* obligations is not an unrestricted right and should be considered in the context of other relevant rules of international law. The claim that States are permitted to exercise universal jurisdiction over international crimes should be subject to balancing the rights of the States involved to avoid the infringement of prohibited rules under international law (Sections 2 and 3). In other words, the right for non-injured States arising from the violations of *erga omnes* obligations may justify the exercise of universal jurisdiction by

avoiding the breach of the duty of non-intervention. Any exercise of universal jurisdiction even if a State loses its claim of non-intervention is still subject to other prohibitive rules in international law, -ie immunity of officials.

Accordingly, it is contended that a State with a closer link to the crime loses its claim to non-intervention if it fails to prevent the crime or prosecute the offenders (Section 3). The duty of non-intervention is not breached if certain conditions are met (Sections 3.2 and Section 4). The community interests rationale supports the right of non-injured States to exercise jurisdiction by legitimising what would otherwise amount to the violation of the duty of non-intervention (Section 3.5).

It is necessary to examine the conditions that may accompany the exercise of universal jurisdiction to prevent the breach of the duty of non-intervention under international law. The conditions include whether States are allowed to exercise universal jurisdiction *in absentia*, issuance of arrest warrants and carry out investigations. Further, this chapter evaluates the right of States to exercise universal civil jurisdiction based on the community interests and the duty of non-intervention, while acknowledging that State practice does not support the exercise of universal civil jurisdiction (Section 3). Finally, this chapter evaluates the criticisms against the right of States to the exercise of universal jurisdiction.

2. Jurisdiction in International Law

2.1. The Prohibitive Approach

Chapter 2 argued that States are permitted to do anything unless prohibited by international law (Section 3.2) and that this principle also applies to rules of jurisdiction. However, this chapter also provides a justification for the traditional bases of jurisdiction. The understanding of how the rules of jurisdiction operate and what their basis are in international law is important in determining whether States can exercise universal jurisdiction on the basis of violations of *erga omnes* obligations.

There two approaches to the rules of jurisdiction: a permissive approach, which tends to look for a specific rule of international law entitling a State to act and a prohibitive approach, which looks for a specific rule prohibiting the exercise of jurisdiction by a State.¹ It seems contrary to the logic of foreign relations for a State to be entitled to initiate a criminal proceeding against any foreigner, irrespective of any restraint.² Judge Fitzmaurice in *Barcelona Traction* noted that,

‘international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction but leaves to States a wide discretion in that matter... It does, however, (a) postulate the existence of limits whereupon, in any given case, it may be for the tribunal to indicate what these are... and (b) there is an obligation on States to exercise moderation and restraint as to the extent of the jurisdiction assumed by their courts in cases having a foreign element.’³

In other words, there is agreement that States’ powers to exercise criminal jurisdiction over foreigners for acts committed abroad is limited to certain conditions but that there is disagreement over what the restraining conditions are.

Scholars and authoritative sources are divided over the application of the judgment of the PCIJ in *Lotus*⁴ to the rule of universal jurisdiction in respect of international crimes. According to a broad interpretation of *Lotus* States are allowed to regulate their jurisdictional rules unless expressly prohibited by international law. Applying a prohibitive approach to the rules of jurisdiction, Judges Higgins, Kooijmans, and Buergenthal, in their Joint Separate Opinion in *Arrest Warrant*, proposed that international law entitled States to exercise universal

¹ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) 13–4.

² Antonio Cassese, ‘Is the Bell Tolling for Universality: A Plea for a Sensible Notion of Universal Jurisdiction’ (2003) 1 JICJ 589, 592.

³ *Barcelona Traction, Light and Power Company (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 105 Separate Opinion of Judge Sir Gerald Fitzmaurice [70].

⁴ Reydam (n 1) 14–5.

jurisdiction *in absentia* over international crimes.⁵ Likewise, Judge Wyngaert asserted that ‘there is no prohibition under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad’.⁶ In a similar fashion, some commentators relying on the PCIJ’s judgment have concluded that in the absence of a prohibitive rule of international law restricting the exercise of jurisdiction by States, States could exercise universal jurisdiction over certain crimes.⁷

From this perspective, State sovereignty precedes international law, and States are vested with a natural liberty and limitations on the jurisdiction of States are always self-imposed and can be lifted at any time.⁸ Hence, a broad interpretation of the PCIJ’s judgment pays ‘only marginal attention, to the sovereignty or independence of *another* State that might possibly be encroached upon by the assertions of the regulating State’⁹.

The proponents of a broad interpretation of the PCIJ’s dictum tend to look for a specific rule prohibiting the exercise of jurisdiction and do not pay attention to other prohibitive rules under international law (eg the duty of non-intervention or rules of immunity). This understanding of *Lotus* is inconsistent with the general approach to customary international law as discussed in Chapter 2 (Section 3.2) and does not include the prohibitive rules of international law such as the duty of non-intervention and rules on immunity. In this respect, the prohibitive approach is even inconsistent with the PCIJ’s approach in *Lotus* and the ICJ’s approach to customary law in the *Nicaragua*, *Nuclear Weapons*, and *Kosovo* cases. The interpretation that the limits on States should include other prohibitive rules such as non-intervention and immunities is in line with the general approach to customary international law

⁵ *Arrest Warrant of 11 April 2000 (Congo v Belgium)* [2002] ICJ Rep 3 Joint Separate Opinion [54].

⁶ *ibid* Dissenting Opinion of Judge Wyngaert [51].

⁷ Claus Kreß, ‘Universal Jurisdiction over International Crimes and the Institut De Droit International’ (2006) 4 JICJ 561, 565.

⁸ Reydams (n 1) 13.

⁹ Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 25.

(Chapter 2).

The PCIJ in *Lotus* held that ‘international law leaves States a wide discretion which is only limited by prohibitive rules’¹⁰ and that ‘a State can only be required not to overstep the limits which international law places upon its jurisdiction but within these limits, a State’s title to exercise jurisdiction rests in its sovereignty’.¹¹ The PCIJ explicitly referred to the limits imposed on a State by international law. Accordingly, the limits imposed by international law were not the limits that international law directly imposed by restricting the rules of jurisdiction.

The PCIJ also confirmed that international law does not prohibit ‘a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law’.¹² The PCIJ also asserted that territorial criminal law was not an absolute principle of international law and did not coincide with territorial sovereignty.¹³ That is to say, that there could be cases where a State could exercise jurisdiction over acts committed abroad while not infringing its duty of non-intervention in the affairs of other States (eg on the basis of passive personality). This reading justifies the exercise of jurisdiction over acts committed abroad in the absence of a prohibitive rule (the duty of non-intervention).

The general prohibitive rules in customary international law, which are also related to the rules on jurisdiction, are the customary law principles of non-intervention and the

¹⁰ *Case of SS ‘Lotus’ (France v Turkey)* [1927] PCIJ Ser A No 10 19.

¹¹ *ibid.*

¹² *ibid* 18–9.

¹³ *ibid* 20.

sovereignty of States¹⁴, and also rules of immunity.¹⁵ The rules of jurisdiction should also give weight to the customary law principles of non-intervention and sovereign equality of States.¹⁶ The ICJ in *Nicaragua* emphasised that the customary status of the duty of non-intervention is based on the expression of *opinio juris* of States, which has been reflected in numerous declarations and resolutions adopted by international organisations and backed by substantial State practice.¹⁷

The ICJ affirmed that every State has the right to conduct its affairs without outside interference, which includes respect for the political integrity of other States and adhering to the duty of non-intervention by refraining from direct or indirect interference in the internal and external affairs of other States.¹⁸ The ICJ only defined the aspects of the principle of non-intervention which were relevant in *Nicaragua*¹⁹ (eg financial support, training insurgents) and indicated that coercion or the use of force infringe the duty of non-intervention.²⁰ Apart from the use of force and the enforcement of a State's rule in the territory of another State,²¹ the extent of the principle of non-intervention is not clear.²²

The international relations costs incurred by a State because of the exercise of universal jurisdiction is different from the duty of non-intervention under international law.²³ It is the

¹⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [202–14]; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 2131(XX) (21 December 1967); UN, Charter of the United Nations, 24 October 1945, 1 UNTS XVI 1945 art 2(7); Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 art 41; *Corfu Channel (United Kingdom v Albania)* (Merits) (Judgment) [1949] ICJ Rep 9 [35]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 [164].

¹⁵ *Lotus* (n 10) Dissenting Opinion of Judge Moore.

¹⁶ Ryngaert (n 9) 6.

¹⁷ *Military and Paramilitary Activities in and Against Nicaragua* (n 14) [202–3].

¹⁸ *ibid* 202.

¹⁹ *ibid* 205.

²⁰ *ibid* 247.

²¹ *Lotus* (n 10) 18–9.

²² Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22 LJIL 345, 365.

²³ Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 AJIL 1, 2.

duty of non-intervention under international law which determines the legality of the exercise of universal jurisdiction rather than the subjective perspective of the State whose rights are being affected as a result of a proceeding based on universal jurisdiction. Accordingly, assessment of any disruption in the foreign relation of the two State concerned should take into account that a subjective understanding of the duty of non-intervention does not necessarily entail the violation of that duty.

In other words, a proceeding based on the exercise of universal jurisdiction by a State, which may even lead to the deterioration of bilateral relations between the States concerned, cannot necessarily be considered as an infringement of the duty of non-intervention. That said, the degree of disruption in foreign relations caused as a result of an action of a foreign State may have an impact on the shared understanding of States on the kinds of actions that constitute a breach of the duty of non-intervention under international law.

Moreover, a broad interpretation of the *Lotus* judgment or the approach which aims to find a prohibitive rule does not generally apply the prohibitive rules of international law to different forms of jurisdiction. A State exercises its jurisdiction by establishing rules (prescriptive), by establishing procedures for identifying breaches of the rules and the precise consequences thereof (adjudicative), and by forcibly imposing consequences such as the loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules (enforcement).²⁴ Even when there is legislative jurisdiction, an attempt to exercise enforcement or adjudicative jurisdiction in the territory of a foreign State raises issues of consent of the latter State.²⁵ Furthermore, ‘adjudicative’ jurisdiction is not ‘confined to the activity of courts but

²⁴ ‘Jurisdiction of States’ s 3.4 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1436>> accessed 30 June 2015; Yoram Dinstein, ‘The Universality Principle and War Crimes’ (1998) 71 Intl LStudSerUS Naval War Coll 17, 30–2; Roger O’Keefe, ‘Universal Jurisdiction Clarifying the Basic Concept’ (2004) 2 JICJ 735, 737.

²⁵ ‘Jurisdiction of States’ (n 24) 3.4.

extends to that of the prosecutorial authorities of a given State'.²⁶

Although the enforcement of a rule is also subject to the prohibitive rules of international law, the PCIJ's dictum did not infer that the prohibitive rules of international law only related to enforcement jurisdiction. Accordingly, without any authority in international law in this regard, one cannot conclude that prohibitive rules (eg duty of non-intervention) do not apply to prescriptive or adjudicative rules of jurisdiction.

From this perspective, a State's right under international law to exercise prescriptive, adjudicative and enforcement jurisdiction are all individually subject to the prohibitive rules of international law. The level of non-intervention in the affairs of other States could be different depending on the form of the exercise of jurisdiction. The application of any one prohibitive rule (eg non-intervention and immunity) to the three forms of the rules of jurisdiction (eg adjudicative and enforcement) would not necessarily be the same. For instance, a State may have prescriptive jurisdiction over an offence committed abroad but may not have adjudicative jurisdiction (trial) because of a prohibitive rule, such as the personal immunity of an official.

The broad interpretation of the PCIJ's judgment can only give effect to the prohibitive rule of non-intervention and only in a very limited sense. On that basis, the duty of non-intervention is only applicable to the rule of enforcement jurisdiction of one State in the territory of another State. However, intervention may not only occur in this form and could include other acts which can be carried out outside the territory of a State (eg freezing the assets of a State). More importantly, the broader problem with this interpretation is the non-application of the rule of non-intervention and other prohibitive rules of international law to adjudicative and prescriptive rules of jurisdictions.

The facts of PCIJ's judgment also support the contention made here since *both* Turkey and France had jurisdiction (on different grounds), but only Turkey could legitimately exercise

²⁶ Kreß (n 7) 16.

its jurisdiction on the basis that the French ship had docked in Turkish territory after the incident. Furthermore, Turkey's claim was reinforced by the principle of passive personality, ie the victims of the incident held Turkish nationality. The duty of non-intervention in the affairs of France (as its nationals were prosecuted) could be justified on the basis that the victims of the incident were Turkish, thus creating a legal right for Turkey to exercise jurisdiction without infringing the duty of non-proliferation.

Furthermore, the broad interpretation of the PCIJ's dictum fails to distinguish between the availability of universal jurisdiction to international crimes vis-à-vis other crimes, which are recognised under the domestic laws of States, such as murder. Lee asserts that much of domestic criminal law is based on the same values; for instance, he argues that the prohibition against murder is equally universal.²⁷ Thus, according to this broad interpretation, any State is allowed to exercise universal jurisdiction *in absentia* in respect of any act.

2.2. Permissive Approach

The historical development of the rules of jurisdiction suggests a 'careful regard for the necessity of specifying circumstances in which jurisdiction may be exercised', and even today, the overwhelming view of States is that jurisdiction is restricted to avoid infringing the sovereignty of other States.²⁸ From this perspective, 'sovereignty is a quality allocated to certain entities by international law' whereby 'the legal order pre-exists the sovereignty of the State and remains in their control thereof'.²⁹ Therefore 'a State will always have to show a specific rule of international law entitling it to act or at least the absence of a prohibiting rule'.³⁰ According to the permissive principle, 'an exercise of extraterritorial jurisdiction requires a

²⁷ Win-Chiat Lee, 'International Crimes and Universal Jurisdiction' in Zachary Hoskins and Larry May (eds), *International Criminal Law and Philosophy* (CUP 2010) 26.

²⁸ AR Carnegie, 'Jurisdiction Over Violations of Laws and Customs of War' (1963) 39 BYBIL 402, 403–4.

²⁹ *ibid* 13–4.

³⁰ Reydam's (n 1) 13–14; Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 196–200.

justifying principle, whether nationality, the requirements of security, or the universality principle, as in piracy'.³¹

Accordingly, the prohibitive approach emphasises the sovereignty of the forum State and the permissive approach emphasises the sovereignty of the State or States whose nationals may be subject to the jurisdiction of other States.³² However, neither explanation can fully explain the rules of jurisdiction in international law and a compromise between the two is proposed here.

The theory, which requires a permissive rule, is also not without difficulty, as it places the rules of jurisdiction in a different category vis-à-vis other rules of customary law. In other words, it does not provide a justification why a permissive rule is required for the exercise of jurisdiction by States in customary law; yet other actions of States are governed by the general rule, which provides that States are allowed to do anything unless prohibited (Chapter 2).

Nevertheless, the traditional bases of jurisdiction could be viewed as rules which strike a balance between the rights of the forum State to exercise jurisdiction and the right of other States not to be subject to interference in their affairs or other rights which such States or their officials may enjoy under international law, such as immunities³³. In this context, the four types of jurisdiction can be viewed as the distribution of established interests that determine which State has a stronger jurisdictional claim over the offence and the accused³⁴ and inherently aim to prevent the breach of the duty of non-intervention. The traditional bases of jurisdiction contain the competing rights of the States involved, as they both enable and at the same time impose limitations on the exercise of jurisdiction.³⁵

³¹ Robert Yewdall Jennings, *General Course on Principles of International Law* (Brill Nijhoff 1967) 196; Reydam's (n 1) 15.

³² Ryngaert (n 9) 29.

³³ *Arrest Warrant* (n 5) joint separate opinion of Judges Higgins, Kooijmans and Buergenthal [59].

³⁴ Anthony J Colangelo, 'The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes' (2004) 36 *GeoJIntl L* 537, 541; Ryngaert (n 9) 8.

³⁵ Reydam's (n 1) 23–24.

The traditional bases of jurisdiction cannot always provide a clear-cut hierarchy between the claims of various States regarding a claim of jurisdiction over the offence or the accused.³⁶ Since, the traditional bases of jurisdiction do not necessarily determine the outcome of rules of jurisdiction alone, other (prohibitive) rules of international law should still be considered to give proper weight to the legal claims of the States involved.

From this perspective, the traditional bases of jurisdiction are rules regulating the jurisdiction of States by taking into account the sovereignty of the States involved. They are the result of the balancing exercise by taking into account the sovereignty of the States involved. The links (nationality, territoriality, etc) inherent in the traditional rules of jurisdiction allow States to have a stronger claim regarding the non-infringement of the duty of non-intervention. Hence, consistent with the interpretation of the sovereignty of States involved and the general approach to customary international law, one can argue that the right to exercise jurisdiction is dependent on the non-infringement of the prohibitive rules of international law. As discussed, the prohibitive rules need not specifically be limitations on the jurisdiction of States.

The rules of jurisdiction in international law, properly read, should give effect not only to the rights of the forum State to exercise jurisdiction but also to the rights of other States affected as the result of the exercise of jurisdiction by the forum States. This is the balance between the right of one State to exercise its jurisdiction and the prohibitive rules of international law (the duty of non-interference in the domestic affairs of other States and rules of immunity). The correct balance between the rights of the States involved by applying the prohibitive rules of international law dictates the conditions attached to any form of exercise of jurisdiction by States, ie whether States are permitted to exercise universal adjudicative

³⁶ M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *VaJInt'l L* 81, 83 see the example of Lockerbie.

jurisdiction *in absentia* over international crimes.

3. Erga Omnes Obligations and Universal Jurisdiction

3.1. Introduction

Universal jurisdiction is ‘the authority of the State to punish certain crimes wherever and by whom committed’³⁷ and has been described as ‘a principle, allowing jurisdiction over acts of non-nationals where the nature of the crime justifies the repression of some types of crime as a matter of international public policy’.³⁸ Universal jurisdiction is thus usually defined ‘negatively as grounds of jurisdiction which does not require any link or *nexus* with the elected forum’.³⁹ In other words, it is the ‘absence of a link between the crime and the prosecuting State that has captured the essence of universal jurisdiction’.⁴⁰

Legal authorities are divided over the offences which give rise to universal jurisdiction. There only seems to be a consensus around a few international crimes such as genocide, crimes against humanity, war crimes, slavery, and piracy, which are also generally accepted as *jus cogens*.⁴¹

Jus cogens status of crimes is generally associated with the right of States to exercise universal jurisdiction, but, at the same time, there are conventions which also provide for universal jurisdiction for crimes such as hijacking and hostage-taking. In the case of the latter, however, the status of these crimes as *jus cogens* is disputed and the justification for universal jurisdiction for these crimes, instead, is based on their customary law status or the fact that

³⁷ Oscar Schachter, *International Law in Theory and Practice* (Brill Nijhoff 1991) 262.

³⁸ Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 304.

³⁹ Hervé Ascensio, ‘Are Spanish Courts Backing down on Universality-The Supreme Tribunal’s Decision in *Guatemalan Generals*’ (2003) 1 *Journal of International Criminal Justice* 690, 699; AR Carnegie, ‘Jurisdiction Over Violations of Laws and Customs of War’ (1963) 39 *British Yearbook of International Law* 402, 405.

⁴⁰ Institute of International Law (17th Commission), ‘Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes: Rapporteur Christian Tomuschat’ (2005).

⁴¹ Bassiouni (n 36) 108–25; *Demjanjuk v Petrovsky*, 776 F 2d 571 (6th Cir 1985) 75 ILR 539 582-82 genocide and crimes against humanity.

these crimes are only limited to conventional law.⁴²

Chapter 2 noted that, due to problems with the identification of the source of *jus cogens*, there is inevitably disagreement over the norms which have reached the status of *jus cogens*. The reliance on *jus cogens* as a legal concept enabling States to exercise universal jurisdiction has fallen short of providing a persuasive legal justification for crimes of genocide vis-à-vis terrorism or hijacking for the same legal consequence, ie universal jurisdiction.

Adoption of the “core crimes” approach as the method for inference of universal jurisdiction gives rise to the same issue, whereby, in this case, even the status of torture as a crime which could give rise to universal jurisdiction would be disputed.⁴³ Chapter 2 nevertheless suggested that factors such as the gravity of the offence or prosecution of offences in international tribunals could, however, lead to rapid internalisation of these norms by States and thus propel their customary status. Relying on factors such as the gravity of the offence will inevitably lead to the categorisation of international crimes sometimes on non-legal considerations (core crimes). Similarly, as in the case of *jus cogens*, relying on such factors lead to relying on different legal rationales to justify the same legal consequence, ie universal jurisdiction, for different crimes.

Instead, the status of crimes in customary law should be the basis of the categorisation of international crimes which represent the interests of the international community. The factors relevant in the identification of crimes in customary law are the responsibility of States to prevent the commission of crimes and prosecute the alleged offenders and the responsibility of individuals not to commit such acts. This thesis has also argued that offences which give rise to the dual responsibility of States and individuals in customary law give rise to *erga omnes*

⁴² Bassiouni (n 36) 125.

⁴³ Máximo Langer, ‘Universal Jurisdiction Is Not Disappearing: The Shift from “Global Enforcer” to “No Safe Haven” Universal Jurisdiction’ [2015] JICJ 1, 1; Anthony J Colangelo, ‘Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law’ (2007) 48 HarvInt’l LJ 121, 130.

obligations. Violations of *erga omnes* obligations create a right for non-injured States (Chapter 2).

If States are found in violation of crimes giving rise to the dual responsibility of States and individuals and are unwilling or unable to prosecute the perpetrators, then other States can act as a trustee for the international community to prosecute the offenders based on the interests that these norms protect. Accordingly, States are entitled to exercise universal jurisdiction because of the values these norms protect and their multilateral dimension. These two factors were identified to ascertain the customary rules which give rise to *erga omnes* obligations. On the basis that international crimes fulfil both criteria, ie due to their multilateral dimension and interests they protect, it was proposed that they are customary rules which give rise to *erga omnes* obligations.

There are two arguments against the right of States to exercise universal jurisdiction on the basis of violations of *erga omnes*. First, it is generally believed that only *jus cogens* can give rise to *erga omnes* obligations hence arguments based on *erga omnes* obligations cannot explain the right of States to exercise universal jurisdiction in respect of crimes of hostage-taking or hijackings in international law.⁴⁴ Chapter 2 demonstrated that although the concepts of *jus cogens* and *erga omnes* are both associated with the rules which have been internalised by States to the third degree (legitimate norms), some customary rules which have also been internalised by States to the third degree may also give rise to *erga omnes* obligations. That argument undermined the assumption that only *jus cogens* can give rise to *erga omnes* obligations.

Secondly, the exercise of universal jurisdiction by States is sometimes associated with

⁴⁴ Nahal Kazemi, 'Justifications for Universal Jurisdiction: Shocking the Conscience Is Not Enough' (2013) 49 *TulsaLRev* 1, 2.

the concept of *hostis humani generis*.⁴⁵ The discussions in Chapter 2 on international crimes, community interests (third-degree internalisation) and *erga omnes* obligations contended that to understand the interests of the international community from a legal perspective one does not need to rely on concepts such as *hostis humani generis* or the gravity of the offence.

That said, Bassiouni argues that there are two different approaches to the exercise of universal jurisdiction based on the notion of the international community and the interests adopted by the international community. First, the idealist position is based on core values (overriding international interests) accepted by the international community.⁴⁶ Secondly, the policy-oriented approach recognises that certain commonly shared interests of the international community require an enforcement mechanism which transcends the interests of one State.⁴⁷ According to Bassiouni, the two positions disagree over the sources and interests which give rise to universal jurisdiction and over what constitutes the international community and its members, and the nature of the legal rights and obligations incumbent upon States.⁴⁸

As contended earlier, the moral or legitimate values as acknowledged by States can be derived from customary law. It was contended that not all customary rules give rise to community interests, which are internalised to the third-degree by States (ie are legitimate), and that some customary rules are based on the accumulation of States' shared interests. That said, it was asserted that international crimes in customary law, due to their multilateral dimensions, give rise to obligations *erga omnes* as legitimate norms. This position does not rely on a metaphysical or a philosophical conception to carve out the interests of the international community.

Moreover, a State-centric notion of the international community was adopted. The

⁴⁵ Bassiouni (n 36) 88; *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980) 77 ILR 169 890; Eric K Leonard, 'Global Governance and the State: Domestic Enforcement of Universal Jurisdiction' (2015) 16 Human Rights Rev 143, 149.

⁴⁶ Bassiouni (n 36) 97.

⁴⁷ *ibid*.

⁴⁸ *ibid* 98.

interests of the international community should be objectively identifiable and be subjectively made by the States in the international community.⁴⁹ The interests of the international community could be made by States through customary law, which could include both norms on the self-interests of States and norms which are also perceived as legitimate.

While a State-centric notion of community was adopted, the role of individuals and other actors in the formation of States' interests and actions was emphasised in the socialisation processes. Hence, States were held to be central to the notion of the international community, and that the interests of the international community are not a set of predetermined criteria or natural principles. Moreover, the notion of the international community proposed here is different from the policy-oriented approach⁵⁰ since this study, at least from a legal perspective, has situated the interests of the international community in the context of the rules of customary international law.

The answer to the availability of universal jurisdiction in respect of acts which give rise to universal concern lies in the formation process of international law.⁵¹ It has already been proposed that crimes, which have developed in customary international law (ie give rise to dual responsibility), can give rise to obligations *erga omnes* and that international crimes not only represent the shared interests of States but are based on the legitimacy of these norms. This chapter situates the right of States to exercise universal jurisdiction in the context of the rules of jurisdiction based on violations of *erga omnes* obligations and proposes that the exercise of universal jurisdiction on the basis of *erga omnes* obligations does not infringe the duty of non-

⁴⁹ For a different view of the international community and the right to exercise universal jurisdiction, see Joel Colon-Rios, 'Constituent Power, the Rights of Nature, and Universal Jurisdiction' (2014) 60 McGill LJ 127; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 EJIL 387: Villalpando argues that the interests of the international community equate 'public goods', which has already been discussed in Chapter One, where notions of community based on natural principles or predetermined criteria was rejected.

⁵⁰ Bassiouni adopts the policy oriented approach; Bassiouni (n 36).

⁵¹ Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10 Chinese JIL 503, 508.

intervention.

States can exercise jurisdiction if it does not infringe the duty of non-intervention or other prohibitive rules under international law (Section 2). It is contended here that the dual responsibility of crimes, coupled with the exercise of universal jurisdiction based on certain conditions proposed here, ensures that the duty of non-intervention would not be breached. This is because the State with a closer link has failed to abide by its obligation under international law (ie to prevent the commission of crimes or prosecute offenders), thus undermining its claim of the breach of the duty of non-intervention, if its nationals are prosecuted by foreign States.

3.2. Universal Jurisdiction and the Duty of Non-Intervention

According to the interpretation proposed, the traditional bases of jurisdiction⁵² strike a balance between the right of the forum State to exercise jurisdiction and the right of other States and their nationals not to be subject to the jurisdiction of other States (Section 2). The exercise of jurisdiction may infringe the duty of non-intervention in the internal affairs of other States, while the traditional bases of jurisdiction seek to prevent the infringement of the duty of non-intervention in the affairs of other States (Section 2).

This section proposes that the exercise of universal jurisdiction by States based on violations of *erga omnes* obligations may not infringe the duty of non-intervention in the internal affairs of other States. First, the duty of non-intervention should be read in light of the interests that these crimes enshrine. It is generally argued that States can exercise jurisdiction if they have legitimate interests which justify their interference in the affairs of the other State concerned.⁵³ The arguments proposed by legal authorities in favour of universal jurisdiction

⁵² Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 652–72; *Restatement of the Law, Third, Foreign Relations Law of the United States* (American Law Institute 1987) s 402.

⁵³ Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1987) 66 *TexLR* 785, 786; Colangelo (n 34) 540–41.

are generally based on the notion of community interests,⁵⁴ which overrides the right or interest of the State with a closer link.⁵⁵ It has already been noted that international crimes represent the interests of the international community.⁵⁶

The Cairo-Arusha Principles assert that the principle of *non-interference* in the internal affairs of States should be interpreted in light of the fact that it is ‘the well-established and generally accepted principle that gross human rights offences are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction’.⁵⁷

The common interests rationale is drawn from Kant’s writings of *Perpetual Peace*, in which he asserted that the “universal community” has developed to a point where a violation of rights in one part of the world is felt everywhere.⁵⁸ Thus, the core basis of the common interest justification is in line with the assertions made in Chapter 1 of this thesis, in which it was argued that the third-degree internalisation reflects the interests of the States, which are also legitimate.⁵⁹

The common interests rationale ‘acknowledges that the conduct of those who perpetrate serious international crimes in one State has an impact on other States; such conduct poses a potential threat to all States and thus all States have an interest in prosecuting the wrongdoer’.⁶⁰

⁵⁴ Edwin D Dickinson, ‘Jurisdiction with Respect to Crime’ (1935) 29 AJIL 435; Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’ (2004) 45 HarvInt’l LJ 183, 214–16; Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) xix, xx: Cassese acknowledges the tension between the duty of non-intervention and universal jurisdiction and submits that this equilibrium may be changing in favour of the principle of universal jurisdiction.

⁵⁵ Bartram S Brown, ‘The Evolving Concept of Universal Jurisdiction’ (2000) 35 New EngLRev 398, 390–91.

⁵⁶ See also Mitsue Inazumi, *Universal Jurisdiction in Modern International Law* (Intersentia 2005) 39.

⁵⁷ Cairo-Arusha Principles of Universal Jurisdiction in Respect of Gross Violations of Human Rights Offences: An African Perspective (2002), art 6.

⁵⁸ Immanuel Kant, *Kant: Political Writings* (2nd edn, CUP 1991) 107–8.

⁵⁹ Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 250, 294–307.

⁶⁰ Jonathan H Marks, ‘Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council’ (2003) 42 ColumJTransnat’l L 445, 465.

Crimes under international law are directed against the interests of the international community as a whole and hence every State is entitled⁶¹ as a trustee of the international community (on a subsidiary basis) to prosecute and punish these crimes, regardless of who committed them and against whom they were committed.⁶² There is also support for this proposition that the common interests of States and universal jurisdiction are intertwined in national judgments⁶³ and other legal authorities.⁶⁴

Secondly, the duty of non-intervention should be viewed in the context that most States exercise prescriptive universal jurisdiction in respect of war crimes, crimes against humanity, genocide and crimes under certain conventions which oblige States to criminalise and prosecute⁶⁵ (Appendix). International courts have expressed views in support of the right of

⁶¹ Ryngaert (n 9) 114; *Prosecutor v Tihomir Blaskic* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II) (ICTY, the Appeals Chamber) IT-95-14-AR108 [29]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [1996] ICJ Rep 595 [31].

⁶² Gerhard Werle, *Principles of International Criminal Law* (2nd edn, Asser Press 2009) 154; Beth Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 Yale JInt'l L 1, 41; FA Mann, *The Doctrine of Jurisdiction* (Brill Nijhoff 1964) 95; Florian Jeßberger, "'On Behalf of Africa": Towards the Regionalization of Universal Jurisdiction?' in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds), *Africa and the International Criminal Court* (TMC Asser Press 2014) 157; Institute of International Law, 'Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes' (n 40) 1–2; *Restatement of the Law, Third, Foreign Relations Law of the United States* (n 52) 257 s 404; ILC, 'The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the basis of Comments and Observations of Governments' (29 July 2010) A/65/181 4–5.

⁶³ *Demjanjuk v Petrovsky* (n 41); *Polyukhovic* (Australia, High Court) (1991) 91 ILR 1 121 Judge Toohey.

⁶⁴ Marks (n 60) 465–67.

⁶⁵ Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World', Index IOR 53/019/2012 6, 16–22; UNGA Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1985, entered into force 26 June 1986) 1465 UNTS 85 arts 2-7 and 12; Convention for the Suppression of Unlawful Seizure of Aircraft (entered into force Oct. 14 1971) 860 U.N.T.S. 105 (185 state parties) arts 7 and 10; UNGA International Convention Against the Taking of Hostages (adopted 17 Dec 1979, entered into force 3 June 1983) 1316 UNTS 205 arts 5(2) and 8(1); UNGA Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973 (opened for signature on 14 Dec 1973, entered into force 20 Feb 1977) 1035 UNTS 167 arts 4 and 6; UNGA Single Convention on Narcotic Drugs (adopted by GA Res A/RES/3444 on 30 March 1961, entered into force 13 December 1964) 520 UNTS 151 art 36(2)(a)(vi) ; Hijacking Convention 1970 art 6(4).

States to exercise universal jurisdiction in relation to international crimes.⁶⁶ For instance, the ICJ has found that Article VI of the Genocide Convention does not entail any territorial limitation of the respective obligation under international law to punish the crime of genocide,⁶⁷ thereby implicitly recognising that State may have a right to exercise universal jurisdiction in international law with respect to the crime of genocide.

The ICTY has also held that ‘international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish authors of such crimes’.⁶⁸ The Special Court for Sierra Leone in *Lomé Accord Amnesty* repeatedly referred to the right of States to exercise universal jurisdiction over international crimes in support of the claim for its own jurisdiction to exercise jurisdiction⁶⁹.

The right to exercise jurisdiction by international courts over international crimes is different from the right of States to exercise universal jurisdiction based on *erga omnes* violations. The right of the international tribunals to exercise jurisdiction over international crimes can be attributed to a mandate granted to these tribunals by the international community⁷⁰ (eg resolutions passed under Chapter VII of the UN Charter⁷¹). In the case of the ICC, States exercise their jurisdiction collectively through the tribunal⁷². Moreover, the violation of *erga omnes* obligations, ie the failure of the State to prevent and prosecute the

⁶⁶ Andreas Zimmermann, ‘Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters’ in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2012) 339–49.

⁶⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 61) [31].

⁶⁸ *Prosecutor v Anto Furundzija* (Trial Judgment) ICTY IT-95-17/1-T (10 December 1998) [56].

⁶⁹ *Lomé Accord Amnesty*, Special Court for Sierra Leone, Appeals Chamber, *Lomé Accord Amnesty*, SCSL 2004 15 AR72 (E) p 1236 [67–70].

⁷⁰ *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction) SCSL-2003-01-I, App Ch (31 May 2004) [51].

⁷¹ *Prosecutor v Dusko Tadic A/K/A ‘Dule’* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1 (2 October 1995) [28–31].

⁷² Dapo Akande, ‘The Jurisdiction of the International Criminal Court Over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 JICJ 618, 621–22; Michael P Scharf, ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position’ (2001) 64 LCP 67, 98.

alleged offenders, which give rise to a right of States to exercise universal jurisdiction are not limited to crimes prosecuted only in international courts (Chapter 2, Sections 3.3-3.6).

Regional institutions⁷³ and courts⁷⁴ have also held that States are entitled to exercise universal jurisdiction. Given that the exercise of universal jurisdiction on the basis of *erga omnes* violations is a right rather than duty, the low number of prosecutions by States on the basis of universal jurisdiction can be justified by the fact that States can select not to exercise this right⁷⁵.

Neither rules of customary law nor *erga omnes* obligations, which create only a right, support the claim that States are obliged to prosecute offenders on the basis of universal jurisdiction.⁷⁶ There does not seem to be a consensus regarding the obligatory status of the exercise of universal jurisdiction in international law. Generally, government authorisation is

⁷³ Council of Europe (Directorate of Legal Advice and Public International Law), ‘Observation on the Scope and Application of the Universal Criminal Jurisdiction in the Work of the Council of Europe’ (20 Sep 2012) s I; Inter-American Commission on Human Rights, ‘Resolution on Trial for International Crimes’ (24 October 2003) Resolution No 1/03; African Union, ‘Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction’, Doc Assembly/AU/14(XI), 2008 Sharm El-Sheik, Assembly/AU/ Dec 199 (XI) para 5 (i–iii); African Union Model National Law on Universal Jurisdiction over International Crimes, Executive Council Decision, EX.CL/731(XXI) c 2001 art 4; African Union, ‘Decision on the Abuse of the Principle of Universal Jurisdiction’, Doc EX.CL/731(XXI) Assembly/AU/Dec4 20(XIX) 2012; UNGA Sixth Committee (66th Session), ‘Summary record of the 12th meeting’ (16 Nov 2011) A/C.6/66/SR.12 (Non-Aligned Movement’s [NAM] representing 120 States) endorsing the concept of universal jurisdiction but warning against its abuse specifically with respect to immunities of incumbent high-ranking officials; Jeßberger (n 62) 162, 164; Statute of the Extraordinary African Chambers Within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad Between 7 June 1982 and 1 December 1998 art 3, Jan 30, 2013, 52 ILM 1028 (2013) the temporal jurisdiction of the Chambers extends beyond the obligations of Senegal under the Torture Convention since the crimes covered under the jurisdiction of the Chambers are between 1982-1990 (as the ICJ noted, Senegal was only obliged under the Torture Convention from 1987).

⁷⁴ *Jorgic v Germany* (ECtHR) (12 July 2007) 148 ILR 234 [67–9]; *Ould Dah c France*, Requête no 13113/03, Council of Europe: European Court of Human Rights, 17 March 2009 [15–6].

⁷⁵ Antonio Cassese, ‘On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 EJIL 2, 5; Langer (n 43) 4; Eugene Kontorovich, ‘The Inefficiency of Universal Jurisdiction Symposium: Public International Law and Economics’ (2008) 2008 UIILRev 389, 396.

⁷⁶ Bassiouni initially favoured a duty to prosecute offenders on the basis of *erga omnes* obligations, however, in a later article Bassiouni articulated the application of universal jurisdiction in respect of *jus cogens* and international crimes; see the following articles for more detail: M Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and Obligations *Erga Omnes*’ (1996) 59 LCP 63; Bassiouni (n 36).

necessary for prosecutions on the basis of universal jurisdiction; and there is a low number of prosecutions on the basis of universal jurisdiction (although it is slowly increasing).⁷⁷ Additionally, due to practical difficulties associated with the exercise of universal jurisdiction, it is difficult to conceive how such a duty can develop in customary international law without first addressing the practical challenges related to the prosecutions based on universal jurisdiction (ie access to evidence and witnesses, etc).⁷⁸

Thirdly, certain safeguards can ensure that the exercise of universal jurisdiction would not become a political tool to endanger the political integrity of other States, such as increasing the procedural legitimacy of the exercise of universal jurisdiction. As the exercise of universal jurisdiction is based on community interests, and the State prosecuting the offender is acting as a trustee of the international community, the international community must have recognised the commission of that crime or crimes as a matter of fact. This prevents different allegations regarding the facts of the offence or offences that occurred in the territory of another State. States may present different claims about a situation; thus, a communal consensus in this regard is also necessary.

Langer's empirical research of the number of cases or complaints considered by States on the basis of universal jurisdiction demonstrates that only one-third of cases or complaints considered led to prosecutions, and that these prosecutions were mostly related to Yugoslavia, Rwanda, and Nazi-rule crimes.⁷⁹ These prosecutions demonstrate that there was a conscious decision on the part of the States to prosecute individuals associated with the atrocities of Yugoslavia and Rwanda and Nazi Germany. The atrocities committed had received wide condemnation and recognition in international fora and several of the individuals involved in

⁷⁷ See further in this section for the requirement of governmental authorisations for the exercise of universal jurisdiction and also see generally Langer's empirical research on the number of prosecution on the basis of universal jurisdiction; Langer (n 43).

⁷⁸ Richard Dicker, 'A Few Reflections on the Current Status and Future Direction of Universal Jurisdiction Practice' (2013) 107 ASIL PROC 233, 233–34.

⁷⁹ Langer (n 23) 8.

those atrocities were prosecuted in international tribunals (ICTY, ICTR, and the Nuremberg tribunals⁸⁰).

Put differently, when a State is asserting universal jurisdiction, then an objective assessment of facts is needed. Without this, the State claiming to exercise universal jurisdiction on the basis of *erga omnes* violations has a weaker claim in terms of acting as the trustee of the international community and may risk breaching the duty of non-interference towards the State with the closer link to the crime.

The objective of establishing a proper venue for punishing offenders must be balanced with the well-established notions of State sovereignty, justice, and procedural fairness.⁸¹ It has been argued elsewhere that this balance cannot be achieved by allowing individual States to exercise universal jurisdiction since there is a danger that the legitimacy of international law will be undermined as a result.⁸² That said, if the international community recognises the commission of the crimes through international institutions, then a State's exercise of universal jurisdiction in respect of those crimes enjoys a higher claim to procedural legitimacy.

On the contrary, if the international community endorses amnesty of offenders for achieving peace or other ulterior political objectives, then prosecutions on the basis of universal jurisdiction in cases which the international community has endorsed amnesties lack procedural legitimacy⁸³. The UN has participated in various amnesty negotiations granted by

⁸⁰ Robert Kurt Woetzel, *The Nuremberg Trials in International Law: With a Postlude on the Eichmann Case* (2nd edn, Stevens 1962) 42–43, arguing that Nuremberg was a genuine international court; Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Brill Nijhoff 2012) 32–33 see for a different view on Nuremberg as an international tribunal; Formulation of Nuremberg Principles, UNGA Res 488, A/RES/489(V).

⁸¹ Gene Bykhovsky, 'An Argument Against Assertion of Universal Jurisdiction by Individual States' (2003) 21 *Wis Int'l LJ* 161, 162.

⁸² *ibid.*

⁸³ Charles P IV Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 *Berk J Intl L* 283, 286, 298; Kontorovich (n 75) 402–3; *ibid* 407, Subpart B: Argues that State practice supports amnesties for *jus cogens* violations; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (The New Press 2013) 292–310: The amnesties granted by the international community are to be differentiated with amnesties granted by national authorities.

States⁸⁴. Nonetheless, the recognition of amnesties granted only by national authorities in cases of violations of international crimes risks undermining these crimes as legitimate interests recognised by the majority of States⁸⁵, while recognition of amnesties is inconsistent with the non-derogability of many of international crimes which are *jus cogens*⁸⁶. In this way, recognition of amnesties endorsed by the international community balances the aim of ensuring future repression of the crime with the creation of stability and maintenance of peace in certain States⁸⁷.

Prosecutions in the absence of factual recognition of potential *erga omnes* violations by the international community may lead to incoherent applications of these norms, especially if such prosecutions are only carried out by more powerful States against those less so. Additionally, the legitimacy of the exercise of universal jurisdiction would also be enhanced if an international institution recognised the unwillingness and inability of a State with a closer link to prosecute the accused.⁸⁸ This way an international body can ‘alleviate some of the international tensions related to the perceived abuses of the exercise of universal jurisdiction’.⁸⁹

The legitimacy of the exercise of universal jurisdiction by States could be enhanced by the recognition of the potential commission of crimes from a factual perspective by international institutions, their organs or offices within them. For instance, this could include the resolutions of the UNGA and UNSC or resolutions or reports of other relevant international bodies (including their organs) which have a widespread membership. These could also

⁸⁴ Trumbull (n 83) II.A(2)(b).

⁸⁵ Diane F Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 YaleLJ 2537, 2585–93; Customary law prohibits amnesties granted by States; UNCHR Res 2002/79 (25 April 2002); *Prosecutor v Kallon & Kambara* (Decision on Challenge to Jurisdiction: Lome Accord Amnesty) SCSL-2004-15-AR72(E), SCSL-2004-16-AR72 [6–9]; *Prosecutor v Anto Furundzija* (n 68) [155].

⁸⁶ Ronald C Slye, ‘The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible’ (2002) 43 VaJInt’l L 173, 175.

⁸⁷ Orentlicher (n 85) 2542.

⁸⁸ Kreß (n 7) 584.

⁸⁹ Fannie Lafontaine, ‘Universal Jurisdiction — the Realistic Utopia’ (2012) 10 JICJ 1277, 1292.

include, for example, the findings of the Office of the Prosecutor of the ICC (an independent organ of the ICC and its Prosecutor and Deputy Prosecutor are elected by the Assembly of States Parties⁹⁰), the Committee against Torture, Committee on the Elimination of Racial Discrimination, Committee on Enforced Disappearance, annual reports of the Human Rights Council and reports of the Working Groups, Independent Rapporteurs and Special Rapporteurs of the Human Rights Council. There are indications that, in practice, when ‘international or national bodies do not know or officially acknowledge the criminal acts, specific allegations, and factual substance of criminal allegation against a suspect, prosecutorial authorities are unlikely to take action against a temporarily present’ suspect.⁹¹

That being the case, any exercise of universal jurisdiction by the international community must be accompanied by the recognition of the potential commission of those crimes and the inability/unwillingness of the State with the closer link to prosecute the accused. These factors not only ensure the legitimacy of the exercise of universal jurisdiction and limit the abuse of power to exercise universal jurisdiction, they also safeguard the forum State against any potential claim by the State with a closer link. The burden of proof lies with the State which is prosecuting a foreign national on the basis of universal jurisdiction to show that its proceedings are justified under international law⁹² in a proceeding brought by a State with a closer link to the crime as a result of the exercise of jurisdiction by its courts.

Moreover, many States require the authorisation of their governments (generally a minister) or top prosecutors at various stages of proceedings (varying from the initiation of proceedings/investigations to issuing arrest warrants) on the basis of universal jurisdiction.⁹³ Within this context, the requirement of the consent of the authorities to initiate proceedings

⁹⁰ ‘Office of the Prosecutor’ <<https://www.icc-cpi.int/about/otp>> accessed 22 November 2016.

⁹¹ Wolfgang Kaleck, ‘From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008’ (2008) 30 *MichJInt’l L* 927, 960.

⁹² Reydam (n 1) 21–22.

⁹³ See generally Amnesty International, ‘Universal Jurisdiction’ (n 65).

seems to have been incorporated in domestic legislation to effectuate the desire of States to limit prosecutions on the basis of universal jurisdiction. The primary objective of the requirement of the consent of the authorities is to avoid causing disruption in the foreign relations of States⁹⁴ rather than viewing the exercise of universal jurisdiction as an infringement of the duty of non-intervention⁹⁵.

The requirement of ministerial or government approval may not necessarily work against procedural legitimacy.⁹⁶ As the contours of the exercise of universal jurisdiction are not clearly defined under international law, governmental oversight might initially strengthen the exercise of universal jurisdiction, as it will prevent the abuse of the system by limiting criminal proceedings on the basis of universal jurisdiction.⁹⁷ In this respect, governmental authorisation strengthens the exercise of universal jurisdiction in the long term as members of governments are better positioned to appraise cases individually from an international law perspective.

Governmental authorisation can preclude the exercise of universal jurisdiction by national courts when such exercise could be inconsistent with a State's obligations under international law. Governmental authorisation is especially important in situations where the national law has not yet incorporated the rules of international law which may be pertinent to a State's exercise of universal jurisdiction. For instance, this could be so in cases which assert that universal jurisdiction might undermine the peace process in the home State of the accused⁹⁸ through the non-recognition of amnesties granted by the international community⁹⁹.

⁹⁴ Afua Hirsch, 'Ministers Move to Change Universal Jurisdiction Law' *The Guardian* (30 May 2010) <<http://www.theguardian.com/uk/2010/may/30/change-universal-jurisdiction-law>> accessed 21 January 2016.

⁹⁵ Langer (n 23) 2–6.

⁹⁶ Florian Jeßberger and Julia Geneuss, "Litigating Universal Jurisdiction" — Introduction' (2015) 13 JICJ 205, 3: see also for the potential abuse of the exercise of universal jurisdiction by interested parties which may hinder the development of prosecution of offenders in national courts.

⁹⁷ Rephael Ben-Ari, 'Universal Jurisdiction: Chronicle of a Death Foretold' (2014) 43 DenvJInt'l L& Pol'y 165 see generally.

⁹⁸ Kontorovich (n 75) 390–91.

⁹⁹ *ibid* 402–3.

Fourthly, the duty of non-intervention is owed to foreign States, and international crimes giving rise to obligations *erga omnes* are prohibited for both the State and the individual.¹⁰⁰ It is inconceivable how a State could infringe its duty of non-intervention by prosecuting foreigners on the basis of universal jurisdiction if the exercise of jurisdiction does not involve coercion or is not targeting the political integrity of another State, which could amount to direct or indirect interference in the internal affairs of another State. When a State has failed to prevent the commission of the crime and subsequently fails to prosecute the alleged perpetrators of international crimes, this would inevitably weaken its claim regarding the breach of this duty since it has failed to abide by its obligations under international law. If the State with a closer link is willing and able to prosecute the offenders, then arguably that State is not in breach of the duty to prevent and prosecute the alleged offenders.

This is in contradiction to the belief of some that the subsidiarity of the exercise of universal jurisdiction is not a requirement in international law.¹⁰¹ The contention here is not that a separate rule of customary international law in respect of subsidiarity has emerged; rather, subsidiarity is inherent in *erga omnes* obligations and the duty of non-intervention.¹⁰² The principle of subsidiarity does not create a hierarchy among jurisdictional bases, as it is based on the concept of *erga omnes* obligations and the duty of non-intervention. Other jurisdictional bases are also subject to the duty of non-intervention.

Moreover, the exercise of universal jurisdiction is distinct from the *aut dedere aut judicare* principle, as the source of the obligation of the principle of *aut dedere aut judicare* is only conventional law.¹⁰³ As *aut dedere aut judicare* creates a duty and *erga omnes* create a right, the obligation to prosecute or extradite does not collide with the right to prosecute or

¹⁰⁰ Reydam's (n 2) 155 summarising *Public Prosecutor v. Sokolovic*, *Oberstes Landesgericht Dfisseldorf*, Nov. 29, 1999; BGH, Feb. 21, 2001, reprinted in part in *Neue Zeitschrift für Strafrecht* 658.

¹⁰¹ Lafontaine (n 89) 1286.

¹⁰² Cassese, 'Is the Bell Tolling for Universality: A Plea for a Sensible Notion of Universal Jurisdiction' (n 2) 593; Kreß (n 7) 578.

¹⁰³ Lafontaine (n 89) 1287–1291.

extradite.

The subsidiarity of the exercise of universal jurisdiction is supported by the fact that most of the States which have incorporated universal jurisdiction primarily prefer the prosecution to be conducted by the State with the territorial link, but are at the same time willing to exercise universal jurisdiction if the State with the closer link to the crime is unwilling or unable to prosecute (eg, Australia,¹⁰⁴ Spain,¹⁰⁵ Switzerland,¹⁰⁶ South Africa,¹⁰⁷ Argentina,¹⁰⁸ Italy,¹⁰⁹ Belgium,¹¹⁰ New Zealand,¹¹¹ UK¹¹², Cuba,¹¹³ and Vietnam¹¹⁴). There is also support in legal authorities for this proposition.¹¹⁵

¹⁰⁴ UNGA Sixth Committee, 'Australian Views on the Scope and Application of the Principle of Universal Jurisdiction' (2010) A/65/181 1.

¹⁰⁵ Antoni Pigrau, 'Correspondents' Reports: Spain' (2011) 24 YIHL 4; *Guantánamo Bay* (Spanish National Court, Preliminary Proceedings 134/2009) Central Investigating Court No. 6. Order of 13 April 2011.

¹⁰⁶ UNGA Sixth Committee, 'Switzerland's Submissions to the UNGA Sixth Committee, Sixty-Sixth Session' (2011) A/66/93 1–3.

¹⁰⁷ *National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 30 October 2014 51–4, 61–4.

¹⁰⁸ UNGA Sixth Committee, 'Argentina's Submissions to the UNGA Sixth Committee, Sixty-Sixth Session' (2011) A/66/93 1; Argentina: ICC Implementation Statute 2007 art 3(c).

¹⁰⁹ UNGA Sixth Committee, 'Italy's Submissions to the United Nations Sixth Committee' (2010) A/65/181 para 2 and 4.3; Italy: Criminal Code of the Republic of Italy (amended in 2011) art 10.

¹¹⁰ UNGA Sixth Committee, 'Belgium's Submissions to the UNGA Sixth Committee, Sixty-Fifth Session' (2010) A/65/181 para [5] and [17(d)].

¹¹¹ A/C.6/66/SR.12 (n 73) 2–3.

¹¹² UNGA Sixth Committee, 'United Kingdom's Submissions to the UNGA Sixth Committee, Sixty-Fifth Session' (15 April 2011) A/66/93 3.

¹¹³ UNGA, 'Report of the Secretary-General on the Scope and Application of the Principle of Universal Jurisdiction' (2012) A/67/116 para 34.

¹¹⁴ *ibid* 41.

¹¹⁵ *Arrest Warrant* (n 5) Separate Opinion of Judge Rezek [4]; *ibid* Separate Opinion of President Guillaume [12–16]; see also *Center for Constitutional Rights et al v Donald Rumsfeld et al* (Higher Regional Court of Stuttgart) Case No 5 Ws 109/05, Decision of 13 September 2005; Kreß (n 7) 562; Carnegie (n 28) 403–5; Geoff Gilbert and Anna Magdalena Rüscher, 'Jurisdictional Competence Through Protection to What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?' (2014) 12 JICJ 1093, 1110–12; Council of Europe (European Committee on Crime Problems), 'Extraterritorial Criminal Jurisdiction Council of Europe, European Committee on Crime Problems' (1992) 3 Criminal Law Forum 441 452; Institute of International Law (1st Commission), 'Universal Civil Jurisdiction with Regard to Reparation for International Crimes: Rapporteur M. Andreas Bucher' (30 August 2015) art 2.

The subsidiarity principle¹¹⁶ in doctrine also supports the argument here that States are entitled to exercise universal jurisdiction on the basis of *erga omnes* violations. According to the subsidiarity principle, ‘the decision to prosecute is not taken in isolation by the State claiming jurisdiction, but requires a certain understanding, if not agreement, by the other State which is more directly concerned, for instance, the State where the offence has been committed’.¹¹⁷ De Vattel, for example, argued that, if the State where the crimes have been committed reclaims the perpetrators to bring them to punishment, they ought to be surrendered to that State and that the trial in that State is more likely to provide procedural justice.¹¹⁸

In this sense, the proposed entitlement of States to prosecute on the basis of *erga omnes* violations is differentiated with the understanding of the universality principle, which places universal jurisdiction at a philosophical level. Universal jurisdiction from a philosophical perspective ‘does not supply an inadequacy of another more competent jurisdiction to avoid impunity, but is an independent and primary right’.¹¹⁹ However, the similarity between the universality principle and the entitlement of States to prosecute offenders on the basis of *erga omnes* violations is that when a State exercises universal jurisdiction it protects the interests of the international community and the prosecuting State is acting on behalf of the international community.¹²⁰

¹¹⁶ Cassese, ‘Is the Bell Tolling for Universality: A Plea for a Sensible Notion of Universal Jurisdiction’ (n 2) 614 that the subsidiarity principle is part of customary international law; Lafontaine (n 89) 1287 aut dedere aut judicare is distinct from the obligation to prevent and punish.

¹¹⁷ Council of Europe, ‘Extraterritorial Criminal Jurisdiction Council of Europe, European Committee on Crime Problems’ (n 115) 452.

¹¹⁸ Emer de Vattel, *The Law of Nations: Or Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns* (Bela Kapossy, Richard Whatmore and Knud Haakonssen eds, Liberty Fund Inc, US 2008) 228 para. 233; Ryngaert (n 9) 102; Council of Europe, ‘Extraterritorial Criminal Jurisdiction Council of Europe, European Committee on Crime Problems’ (n 115) 452; Reydam (n 1) 31, 33 citing Donnedieu de Vabres, *Les principes modernes du droit pénal international* (1928) 153-60; citing K Miklitzanski, *Le Système de l’universalité du droit de punir et le droit pénal subsidiaire ...* (Librairie du Recueil Sirey 1936) 338–39, *ibid*; Hugo Grotius, *Rights of War and Peace: Bks. 1-3* (Richard Tuck ed, Liberty Fund Inc 2005) Book II, ch XXI, s IV; Vattel 227-28 para 233.

¹¹⁹ Reydam (n 1) 33 citing Miklitzanski; K Miklitzanski, *Le Système de l’universalité du droit de punir et le droit pénal subsidiaire...* (Librairie du Recueil Sirey 1936) 338–39.

¹²⁰ Marks (n 60) 467 s. 3 Agency Rationale.

Further, the rules of jurisdiction strike a balance of rights between the State wishing to exercise jurisdiction and the State affected as a result of that exercise of jurisdiction. Accordingly, from the perspective of the rules of jurisdiction, the subsidiarity enshrined in the exercise of universal jurisdiction based on *erga omnes* violations proposed here strikes the right balance between the rights of the two competing States by taking into account the rights and obligations of the State affected.¹²¹

On that basis, the breaches of the duty of non-intervention are justified in relation to the State whose national is being implicated in a foreign court, since it has failed to prevent the crime and has also failed to prosecute the offender. In conventional law, there is no requirement to extradite to the State with a territorial link (or to a State with a closer link) for prosecution. Generally, these conventions only require the State to extradite to another State signatory, which requests the extradition if it does not prosecute the accused.¹²²

3.3 Universal Criminal Jurisdiction and Universal Civil Jurisdiction

First, universal civil jurisdiction in respect of crimes is supported on the basis of community interests, ie *erga omnes* obligations, since community interests' rationale does not differentiate between civil and criminal proceedings. The argument that States lose their right of non-intervention in their domestic affairs if they fail to prevent or prosecute the alleged offenders is not limited to criminal proceedings and could be applied to civil proceedings, as it is based on the interests of the international community. This argument entails that 'the lawfulness of universal *tort* jurisdiction over gross human rights violations could be based on the acquired lawfulness of universal *criminal* jurisdiction over the same violations'.¹²³ On that basis, it could be argued that 'if universal criminal jurisdiction is permissible under

¹²¹ Lafontaine (n 89) 1290.

¹²² See for example, the Torture Convention; other conventions mentioned in Chapter Two also have similar provisions on the obligation to prosecute or extradite; Torture Convention (n 65) art 5(2), 7(1) and 8(4).

¹²³ Ryngaert (n 9) 38, 127; Stephens (n 62) 51–53.

international law, universal civil jurisdiction is also permissible'.¹²⁴ The fact that only the United States exercises universal civil jurisdiction does not entail that such a right does not exist in international law.

Secondly, the differences between criminal and civil proceeding (ie the lower level of interference, generally initiated by private parties, etc) hold that civil proceedings could be considered as less intrusive in the affairs of other States thereby avoiding infringement of the duty of non-intervention. Civil cases are less prone to political influence, as governments play no role other than adjudicating the suit between private parties. In comparison to criminal proceedings, where authorities have the power to initiate proceedings or halt them in certain cases, civil suits are usually 'instigated and largely controlled by private individuals and groups who may be undeterred by considerations relating to the damaging impact of such proceedings on international relations'.¹²⁵ Thus, the likelihood of protests by States for the politicisation of suits is less.

However, the New Zealand High Court in *Fang* rejected the plaintiff's claim on the assumption that, since third parties (eg NGOs, victims, families of victims and other individuals) could initiate proceedings against a former or incumbent foreign official, this could 'impede the foreign relations of a State as the State will have less authority over civil proceedings'.¹²⁶ This statement is inconsistent with the general belief that what 'applies to criminal jurisdiction applies to some extent *mutatis mutandis* for civil jurisdictions because the latter is considered less intrusive'.¹²⁷

Furthermore, 'the criminal courts of many nations combine civil and criminal

¹²⁴ Reydam's (n 1) 3; Ryngaert (n 9) 38.

¹²⁵ Joanne Foakes, *Position of Heads of State and Senior Officials in International Law* (OUP 2014) 143; *Fang and Others v Jiang Zemin and Others* (New Zealand High Court) (2006) 141 ILR 702 [59–64].

¹²⁶ *Fang v Jiang Zemin* (n 125) [59–64]; Kate Parlett, 'Immunity in Civil Proceedings for Torture: The Emerging Exception' [2006] EHRLR 49, 49.

¹²⁷ Reydam's (n 1) 2–3; Ryngaert (n 9) 126.

proceedings, allowing those injured by criminal conduct to be represented and to recover damages'.¹²⁸ From this perspective, the procedural differences between civil and criminal proceedings do not entail that civil suits could impede foreign relations or are considered as undue interference in the affairs of other State any more than criminal prosecution on the basis of universal jurisdiction.

Moreover, when there is a widespread acknowledgement by the international community of the crimes committed in a State, a State may wish to distance itself from past actions (eg a new administration, which may not want to be linked to the previous administration). Thus, even if such a proceeding is viewed as undue interference, a State may not formally complain.

Thirdly, the aim of universal jurisdiction is to end impunity for the crimes of greatest concern to the international community of States. The primary aim of the civil suits is to provide damages to the victim/s, rather than punishment of the perpetrators, which will ultimately depend on the enforcement powers of any foreign court in terms of the property recoverable in its jurisdiction; thus, the stakes for the defendants are lower in civil cases.¹²⁹

Fourthly, there is support for the idea that the legal implication of international crimes also seems to extend to the civil responsibility of perpetrators.¹³⁰ The African Union (AU) Model National law on Universal Jurisdiction provides that convicted persons can be ordered to make appropriate reparations to the victims.¹³¹ The Institute of International Law, in its 2015

¹²⁸ *Sosa v Alvarez-Machain*, 542 US 692, 124 S Ct 2739, 159 L Ed 2d 718 (2004) 3–4 Opinion of Justice Breyer; Zachary Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 BYBIL 281, 302–4; *Regina v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* (House of Lords) (24 March 1999) [2000] 1 AC 147, 119 ILR 136 Lord Millet 278; ILC, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction: by Special Rapporteur Roman Anatolevich Kolodkin' (10 June 2010) A/CN.4/631 fn 159.

¹²⁹ Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2006) 283–84.

¹³⁰ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 217; Douglas (n 128) 305.

¹³¹ African Union Model National Law on Universal Jurisdiction over International Crimes (n 73) art 19(4).

Resolution, noted that criminal prosecution provided only partial satisfaction to the victims and confirmed that victims of international crimes have a right to appropriate and effective reparation from persons liable for the injury.¹³² Likewise, Judge Loucaides in *Al Adsani* stated that ‘the rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law’ but ‘it is equally valid in relation to any legal liability whatsoever’.¹³³ It has been noted that,

when an individual can be prosecuted and convicted for the commission of a certain crime because the crime is not an act of State but an act also attributable to the individual personally, he can necessarily be ordered to pay damages from his personal estate to indemnify the victims of crimes in civil proceedings.¹³⁴

The individual civil responsibility in international law has, for example, found expression in the Statute of the ICC¹³⁵ and the Torture Convention which obliges States to ensure that the victims of torture obtain redress and have an enforceable right to fair and adequate compensation.¹³⁶ Taking into account the object and purpose¹³⁷ of the Torture Convention and the fact that States can prosecute offenders present in their territories, there is a strong argument that the provision of an enforceable right of compensation to victims of torture is not limited to acts only committed in the territory of a State.¹³⁸

¹³² Institute of International Law, ‘Universal Civil Jurisdiction with regard to Reparation for International Crimes’ (n 115).

¹³³ *Al-Adsani v United Kingdom* (2001) 34 EHHR 11 Dissenting Opinion of Judge Loucaides.

¹³⁴ Alebeek (n 130) 244 and 219.

¹³⁵ UNGA, Rome Statute of the International Criminal Court, 17 July 1998 (last amended 2010), art 75(2).

¹³⁶ Torture Convention (n 65).

¹³⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.

¹³⁸ Douglas (n 128) 504–6; Alexander Orakhelashvili, ‘State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong’ (2007) 18 EJIL 955, 960–61; Xiaodong Yang, ‘*Jus Cogens* and State Immunity’ (2006) 3 NZYIL 131, 143.

4. In Absentia Exercise of Universal Jurisdiction

4.1. Presence in the Territory of the Forum State

The approach adopted to the rules of jurisdiction in international law and the existence of a right to exercise universal jurisdiction ultimately determines whether investigations *in absentia* or even issuing arrest warrants are legal under international law. This depends on whether one adopts a broad interpretation of the *Lotus* judgment,¹³⁹ or the interpretation proposed here in relation to the rules of jurisdiction in international law.

Additionally, consideration should not be given to a specific prohibitive rule of jurisdiction; rather, it should include prohibitive rules of international law. This is necessary for clarifying the legal status of different forms of jurisdiction when a State exercises universal jurisdiction, as each form of jurisdiction (prescriptive, adjudicative and enforcement) should be individually subject to the applicable prohibitive rule of international law.

First, many States which exercise prescriptive jurisdiction require the presence of the offender in their territory.¹⁴⁰ National courts and the individual opinions of judges of national courts suggest that the presence of the accused is a necessary condition for the exercise of universal jurisdiction (adjudicative jurisdiction).¹⁴¹ Other legal authorities also support this proposition.¹⁴² Although there is opposition to the fact that the presence requirement is

¹³⁹ *Arrest Warrant* (n 5).

¹⁴⁰ Amnesty International, 'Universal Jurisdiction' (n 65) annex II.

¹⁴¹ *Javor et al v X* (France, Court of Cassation) (1996) 127 ILR 126 [133]; *Re Sharon and Yaron* (Belgium, Court of Cassation) (2003) 127 ILR 110 110–11; *Center for Constitutional Rights et al v Donald Rumsfeld et al* (Higher Regional Court of Stuttgart) Case No 5 Ws 21/09, Decision of 21 April 2009; *US v Demjanjuk*, 518 F Supp 1362 (ND Ohio 1981) 1387; *Matter of Demjanjuk*, 603 F Supp 1463 (ND Ohio 1984) 1467–68; *Demjanjuk v Petrovsky* (n 41); *Polyukhovic* (n 63) Judge Toohey 118; *Attorney General of the Government of Israel v Adolf Eichmann* (Supreme Court of Israel) (1962) 39 ILR 277 [12(b)]; *Rumsfeld* (2005) (n 115); A/66/93 (n 106) 3; UN Human Rights Council, 'Written Statement Submitted by Reporters Sans Frontiers International: Reporters Without Borders International, a Non-Governmental Organization in Special Consultative Status' (May 2015) A/HRC/29/NGO/X; Pigrau (n 105) 4; Inazumi (n 56) 80–81; ECCHR Interim Report March 2015, 'FDLR Leadership Trial in Stuttgart'; Jeßberger (n 62) 156, 167.

¹⁴² *Arrest Warrant* (n 5) Separate Opinion of Judge Rezek [9]; *ibid* Separate Opinion of Judge Rezek [10]; *ibid* President Guillaume [12]; *ibid* Declaration of Judge Ranjeva [6]; Ryngaert (n 9) 121–22; Cassese, 'Is the Bell Tolling for Universality: A Plea for a Sensible Notion of Universal Jurisdiction'

established in customary international law,¹⁴³ Chapter 2 illustrated that customary law can be created when there is a consensus regarding norms in the international community, as the evidence above illustrates.

In this context, the requirement of the presence of the perpetrator in the territory of the forum State for the exercise of adjudicative jurisdiction will avoid conflict between different legal systems which otherwise have authority, and avoids the exercise of universal jurisdiction which may have disruptive consequences, such as creating instability in the international legal order.¹⁴⁴ Properly read, the requirement of presence of the offender in the territory of another State (or habitual residence) is akin to the connections between the prosecuting State and the offender in other types of jurisdiction (ie territorial, nationality, passive personality and protective principles).

The connection to the forum State not only prevents conflicting adjudicative jurisdiction over the offender but also establishes a link between the offender and the prosecuting State. This puts the exercise of universal jurisdiction in the same context as other types of jurisdiction and avoids breaching the duty of non-intervention by the prosecuting State.¹⁴⁵ A State with a closer link to the crime or the offence has a less compelling claim where the suspect has left the jurisdiction of the State and has voluntarily entered another State.¹⁴⁶ The prosecution of offenders present in the territory of the forum States should also be viewed from the fact that every State has the right not to allow its territory to be a safe haven for offenders of international crimes.¹⁴⁷

Notwithstanding the fact that prohibition of the exercise of adjudicative universal

(n 2) 592; Jeßberger (n 62) 158; Inazumi (n 56) 27; Mary Robinson, *The Princeton Principles on Universal Jurisdiction* (Princeton University 2001) 1(2)-(3); Zimmermann (n 66) 336–37.

¹⁴³ Ryan Rabinovitch, ‘Universal Jurisdiction *in Absentia*’ (2004) 28 Fordham Int’l LJ 500, 510.

¹⁴⁴ Kontorovich (n 54) 189.

¹⁴⁵ Colangelo (n 34) 541.

¹⁴⁶ Lafontaine (n 89) 1286.

¹⁴⁷ Rabinovitch (n 143) 518.

jurisdiction *in absentia* is disputed as customary law, it could be argued that, on the basis of the considerations made here, the duty of non-intervention (or rules of immunity) can be breached by a State if it exercises adjudicative universal jurisdiction *in absentia*.¹⁴⁸ Moreover, the absence of the abused in the trial could also undermine the legitimacy of the proceedings¹⁴⁹ and, as discussed earlier, is an important element in such prosecutions since they are based on community interests.

The requirement of the presence of the offender in the territory of the forum State could also be applicable in civil proceedings. The United States Torture Victims Protection Act does not require the presence of the offender and the only restrictions in the Act are the statute of limitations and exhaustion of remedies in the place where the alleged conduct occurred.¹⁵⁰ That said, the US Supreme Court in *Kiobel v Royal Dutch Petroleum* held that ‘the presumption against extraterritoriality applies to claims under the [Alien Tort Statute], and that nothing in the statute rebuts that presumption’.¹⁵¹ The Supreme Court, in fact, recognised the right to exercise universal civil jurisdiction¹⁵² but strictly limited such claims. The Court asserted that when claims touch and concern the territory of the United States with sufficient force the presumption against extraterritoriality can be displaced.¹⁵³ One could argue that, on the basis of the presence/residence of the victim in the United States, the case sufficiently touches and concerns the US; however, the test adopted by the Court is whether the claim touches and concerns the US, and not whether the parties do so.¹⁵⁴

¹⁴⁸ A State could also be in violation of art 14(3)(d) the right of the offender to be present during the trial International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 1966.

¹⁴⁹ Neil P Cohen, ‘Trial in Absentia Re-Examined’ (1972) 40 TennLRev 155, 177.

¹⁵⁰ Torture Victim Protection Act of 1991, s 2(a), 28 USC s 1350 s 2(b)-(c).

¹⁵¹ *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct. 1659, 569 US 12, 185 L Ed 2d 671 (2013) 1669.

¹⁵² Julian G Ku, ‘*Kiobel* and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute’ (2013) 107 AJIL 835, 835.

¹⁵³ *Kiobel v Royal Dutch Petroleum Co* (n 151).

¹⁵⁴ Curtis A Bradley, ‘Domestic Human Rights Enforcement After *Kiobel*’ (2014) 108 ASIL PROC 145, 146; Ku (n 152); Vivian Grosswald Curran, ‘Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v. Royal Dutch Petroleum Co.*’ (2013) 28 Maryland JIntl L 76; Bradley; Ralph

4.3. Investigations in Absentia

In legal authorities, there is support for the idea that investigations *in absentia* could be conducted on the basis of universal jurisdiction specifically if the presence of the accused on the territory of the forum State is anticipated.¹⁵⁵ One of the few national cases¹⁵⁶ which addressed the issue of adjudicative jurisdiction (investigation part) of States under international law is *Southern Africa Human Rights Litigation Centre*.¹⁵⁷ South Africa's Constitutional Court, in that case, held that South Africa had a duty to investigate torture as a crime against humanity for crimes committed in Zimbabwe with no link to South Africa.¹⁵⁸ The Court argued that South Africa had a close connection to Zimbabwe and that an investigation *in absentia* was justified on the basis that there was some likelihood that the accused would be present in South Africa at some point.

In any event, the Court held that the ICC Implementing Act requirement of the presence of the accused in South Africa was only relevant for the purposes of prosecution before South African courts and not for investigation.¹⁵⁹ Both the prosecution and investigation of a crime are part of the adjudicative jurisdiction. In terms of the exercise of adjudicative jurisdiction (prosecution), as noted, many States require the presence of the offender in their territory.

G Steinhardt, 'Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink' (2013) 107 AJIL 841.

¹⁵⁵ Ryngaert (n 9) 124; Institute of International Law, 'Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes' (n 40) 2; Lafontaine (n 89) 1284.

¹⁵⁶ See for more examples, Lafontaine (n 89) 1285.

¹⁵⁷ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168; 2014 (2) SA 42 (SCA); [2014] 1 All SA 435 (SCA) (27 November 2013); *National Commissioner of the South African Police Service (2014)* (n 107).

¹⁵⁸ *National Commissioner of the South African Police Service (2013)* (n 157) [1]; officials in question were low ranking officials and thus enjoyed immunity *ratione materiae*, *ibid*; *National Commissioner of the South African Police Service (2014)* (n 107); This case was brought under the Implementation of the ICC Statute Act and it is important to note that Zimbabwe is not a party to the ICC Statute, *ibid*.

¹⁵⁹ *National Commissioner of the South African Police Service (2014)* (n 107) [42–8]; obligation to investigate in South African law does not connote with an obligation to investigate in international law, international law permits it but does not oblige States to investigate, *ibid*.

The South African Constitutional Court held ‘that the predominant international position is that presence of the suspect is required at a more advanced stage of criminal proceedings, when a prosecution can be said to have started’.¹⁶⁰ Accordingly, States are allowed to conduct *in absentia* investigations and even issue arrest warrants which are not automatically obligatory for other States (for non-officials or when official immunity is not applicable), since such acts do not impinge on the right of non-intervention of the State whose nationals are implicated in the investigation or the arrest warrant.

Investigations *in absentia* can be beneficial from a practical perspective in the sense that the temporary presence of a suspect is seldom investigated by the authorities, and some cases are ‘only brought to the attention of authorities by investigating NGOs, victims, or victims' communities, who lack resources to conduct their own investigations’.¹⁶¹ This would give NGOs and other interested parties the opportunity to file their petitions if the presence of the accused in the territory of the forum State is anticipated.

Moreover, investigations *in absentia* are likely to play in ‘favour of inter-State cooperation and comity in the fight against international crimes’, taking into account that, ‘in most if not all cases effectively brought forward on the basis of universal jurisdiction, there was ample cooperation between the prosecuting and territorial State’.¹⁶²

Kreß argues that, as far as investigations *in absentia* are concerned, ‘to the extent that a customary title to true prescriptive universal jurisdiction has been proven to exist, States may exercise adjudicative universal jurisdiction by investigating alleged crimes *in absentia*, because of the absence of a prohibitive customary rule’.¹⁶³ Kreß further contends that there is ‘insufficient State practice to assert the creation of a rule that would *specifically prohibit* any

¹⁶⁰ *ibid* 47.

¹⁶¹ Kaleck (n 91) 960.

¹⁶² Lafontaine (n 89) 1286–87.

¹⁶³ Kreß (n 7) 561.

investigative act in the absence of a suspect based (only) on universal jurisdiction'.¹⁶⁴ However, as noted earlier, a prohibitive rule does not need to be specifically related to the rules of jurisdiction. Nevertheless, it is difficult to conceive how investigations *in absentia* could violate the duty of non-intervention.

Judges Guillaume and Rezek, who opposed the exercise of universal jurisdiction (prescriptive, adjudicative and enforcement), did so on the basis that the exercise of universal jurisdiction could lead to judicial chaos and would be open to abuse by the more powerful States.¹⁶⁵ To the extent that these assertions concern trials *in absentia*, the contentions are not disputed; however, investigations *in absentia* do not infringe the duty of non-intervention,¹⁶⁶ and if the practice of universal jurisdiction is limited to situations which have been recognised by the international community, thus providing that practice with legitimacy, these concerns may not arise.

Moreover, the argument here is based on the assumption that the State concerned has not only failed to prevent the crime, but has subsequently failed to prosecute the alleged perpetrators, and that the prosecuting State is acting as a trustee of the international community on the basis of protecting common interests.¹⁶⁷ Accordingly, in the absence of infringement of any prohibitive rule of international law (eg the duty of non-intervention and rules of immunity) investigations *in absentia* are permitted in international law for the commission of international crimes.

4.3. Arrest Warrants

In spite of the fact that investigations are not per se prohibited, the conduct of the investigation may be indirectly prohibited by other rules of international law, such as rules of

¹⁶⁴ *ibid* 577 (emphasis added).

¹⁶⁵ *Arrest Warrant* (n 5) Separate Opinion of President Guillaume [15] and Separate Opinion of Judge Rezek [9].

¹⁶⁶ *Reydams* (n 1) 224.

¹⁶⁷ *Colangelo* (n 34) 550–52.

(personal) immunity if they can lead to a binding arrest warrant. According to this reading, States are *entitled* to initiate investigations and are also allowed to issue non-binding arrest warrants for offenders of international crimes subject to rules of immunity.

If the rules of immunity are not applicable, it can be concluded that States are allowed to initiate investigations or proceedings which do not have the potential to be enforced (ie lead to a binding arrest warrant whilst the official is enjoying personal immunity). This is in contrast to trials *in absentia*; the adjudicative (not the investigation part) and enforcement exercise of universal jurisdiction are dependent on the presence of the perpetrators in the territory of the forum State.

Belgium, in *Arrest Warrant*, had argued that the arrest warrant had no legal status outside Belgium;¹⁶⁸ -ie without further steps taken by third States, it could not have been implemented.¹⁶⁹ Moreover, the arrest warrant issued in Belgium had made an exception in the case of an official visit by Yerodia to Belgium.¹⁷⁰

The ICJ, in *Arrest Warrant*, held that the arrest warrant was illegal notwithstanding the legal effect of the international arrest warrant itself¹⁷¹ because the official in question enjoyed personal immunity.¹⁷² The fact that the incumbent foreign minister of Congo had to travel abroad in the performance of his functions and that the arrest warrant *could have resulted* in the arrest of Yerodia was sufficient for the ICJ to find that the arrest warrant constituted a violation of Belgium's obligations, because it infringed the immunity from criminal jurisdiction enjoyed by Yerodia (personal immunity).¹⁷³

Belgium had jurisdiction to issue a non-binding arrest warrant which was subject to the rules of immunity and the duty of non-intervention. The mere issuance of the arrest warrant

¹⁶⁸ *Arrest Warrant* (n 5) [65–9] Judgment.

¹⁶⁹ *ibid* 71.

¹⁷⁰ *ibid* 70.

¹⁷¹ *ibid* 13.

¹⁷² *ibid* 60.

¹⁷³ *ibid* 71.

was deemed as sufficient intervention in the affairs of Congo, notwithstanding the fact that ICJ did not consider the issue of intervention from the perspective of the rules of jurisdiction. The duty of non-intervention is also applicable in relation to the rules of jurisdiction. In *Arrest Warrant*, the accused, according to the ICJ, enjoyed immunity from jurisdiction, but the situation may not necessarily have been the same if the accused had not enjoyed immunity.

It could be argued accordingly that on the basis of consideration of the rights of the States involved and *erga omnes* obligations, a State can issue arrest warrants which are not automatically binding unless accepted by the receiving State, subject to the recognition of immunities of officials and other prohibitive rules of international law. If it is argued that immunities (eg foreign nationals who are non-officials or have functional immunity) do not apply with respect to international crimes, then it could be argued that, without a prohibitive rule of international law, the State can exercise adjudicative jurisdiction *in absentia* by issuing a non-binding arrest warrant for the offender.

With that said, in their Dissenting Opinion, Judges Higgins, Kooijmans and Buergenthal asserted that the ICJ should have considered the issue of jurisdiction first as the two concepts are linked.¹⁷⁴ They further added that an arrest warrant could be issued *in absentia: the commencing of an investigation* on the basis of which an arrest warrant issued *in absentia* does not violate the principles of fair trial and recognition of the immunities.¹⁷⁵ This was ultimately based on the recognition that the implementation of the arrest was at the discretion of the State concerned. Therefore, exercise of universal jurisdiction *in absentia*, which may lead to an international arrest warrant (non-binding on third States) does not transgress any prohibitive rule of international law (without a binding international arrest

¹⁷⁴ The connection between rules of immunity and jurisdiction is considered in more detail in Chapter Five *Arrest Warrant* (n 5) Dissenting Opinion of Judges Higgins, Kooijmans and Buergenthal 64 [3].

¹⁷⁵ *ibid* Joint Separate Opinion [56-9].

warrant on third States).¹⁷⁶

States are entitled to issue non-binding arrest warrants, eg issuance of arrest warrants and their international circulation through Interpol have no legal impact unless validated by receiving States¹⁷⁷ for suspects who do not enjoy personal immunity. The responding States are equally entitled to accept or reject arrest warrant requests since they are also not under an obligation to exercise universal jurisdiction (assuming that both the respondent and the requesting State are not party to a convention which obliges States to prosecute/extradite).

The legality of international arrest warrants, which are of a voluntary nature for international crimes based on the exercise of universal jurisdiction, depend on whether the voluntary arrest warrant breaches the rules of immunity as prohibitive rules of international law. The issue of non-binding arrest warrants with regard to the duty of non-intervention is the same as investigations *in absentia* discussed above. Non-binding arrest warrants do not breach the duty of non-intervention. The functional and personal immunities of officials are considered in the next two chapters.

5. *Criticism of Universal Jurisdiction*

Criticisms of the exercise of universal jurisdiction by States revolve around a few specific issues. First, there is the view that the ICC's Statute does not support the exercise of universal jurisdiction by States and that this undermines the right of States to exercise universal jurisdiction in international law. Secondly, there is the argument that disagreement over the conditions of the exercise of universal jurisdiction in international law may lead to the incoherent application of universal jurisdiction. Thirdly, the exercise of universal jurisdiction may lead to the incoherent application of the rules of immunity. Fourthly, there is the view that disparity over recognition of the crimes, which give rise to the exercise of universal jurisdiction

¹⁷⁶ *ibid* Joint Separate Opinion [54].

¹⁷⁷ *ibid* Dissenting Opinion of Judge Oda [13].

may lead to the incoherent interpretation of universal jurisdiction. Fifthly, there is the possibility that the exercise of universal jurisdiction could be subject to political considerations. This section considers these criticisms in the context of the proposed conditions to the exercise of universal jurisdiction.

5.1. The ICC's Statute

First, under the Rome Statute which has received near universal accession, the ICC cannot exercise universal jurisdiction¹⁷⁸. The drafting history of the ICC's Statute demonstrates that the views of States ranged from the proposal on universal jurisdiction¹⁷⁹ to 'the restrictive mandatory consent of all interested States'¹⁸⁰ (including the consent of the State of the nationality of the accused¹⁸¹). Some States which were originally in favour of the universal jurisdiction approach – ie drafts proposed by Germany or South Korea, opted for the proposal which limited the jurisdiction of the ICC to the consent of the State of nationality *or* the territorial State for practical purposes; mainly to make the Statute appealing to more States¹⁸².

¹⁷⁸ ICC Statute (n 135) arts 12 and 13.

¹⁷⁹ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' (15 June - 17 July 1998) A/CONF.183/13 (vol II) p 83 para 20 and p 184 para 48-51 (Germany); *ibid* p 74 para 21 (Czech Republic); *ibid* p 75 para 42 (Latvia); *ibid* p 76 para 59 (Romania); *ibid* p 89 para 70 (Observer for the International Committee of the Red Cross); *ibid* p 97 para 4 (Belgium); *ibid* p 101 para 69 (Luxembourg); *ibid* p 115 para 18 (Bosnia and Herzegovina); *ibid* p 175 para 85 (Mexico); *ibid* p 187 para 15 (Jordan); p 191 para 65 (Switzerland); *ibid* p 193 para 8 (New Zealand); *ibid* p 292 para 70 (Ecuador); *ibid* 325 para 74 (Samoa).

¹⁸⁰ William A Schabas and Sharon A Williams, 'Article 12' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Beck/Hart 2008) 550; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 278–83; Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, A/CONF.183/13 (vol II) A/CONF.183/13 (vol II) (n 179) p 122 para 15 (India); *ibid* p 123 para 28 and p 361 para 21 (United States of America); *ibid* p 123 para 37 (China); *ibid* p 185 para 60 (Syria); *ibid* p 191 para 69 (Iran); *ibid* p 284 para 31 (Israel); *ibid* p 310 para 87 (Egypt); *ibid* p 303 para 157.

¹⁸¹ Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, A/CONF.183/13 (vol II) A/CONF.183/13 (vol II) (n 179) p 195 para 24 (United States).

¹⁸² *ibid* p 299 para 87 and p 190 para 56 Mr van Boven (Netherlands) stated that the 'German proposal based on the principle of universal jurisdiction was a compelling proposition, with which he associated himself. However, if a substantial number of delegations were not able to accept it, and favoured some form of jurisdictional link between the crime committed and an interested State, he would have great sympathy for the proposal of the Republic of Korea'; *ibid* p 296 para 23 (Trinidad and Tobago); *ibid* 187 para 10 (Spain); *ibid* p 314-15 para 14 Mr Larrea Davila (Ecuador); *ibid* 311

As a result, the final draft of Article 12 is considered as a compromise between the two viewpoints¹⁸³; ie Article 12 neither incorporates universal jurisdiction nor the consent of all interested States. Under Article 12 of the ICC Statute, the ICC can exercise jurisdiction over nationals of non-States Parties when the crime has been committed in the territory of a State Party¹⁸⁴ or referrals by the UNSC¹⁸⁵.

The exercise of jurisdiction by the ICC over nationals of non-States Parties for crimes committed in the territory of States Parties or nationals of States Parties who have committed crimes in the territory of other States Parties can be construed as a delegation of the power of States to the ICC to exercise jurisdiction. In other words, States have simply delegated their power to prosecute individuals for the commission of crimes committed in their territories to the ICC and have shared their right to exercise jurisdiction under international law with other States parties¹⁸⁶. Accordingly, the delegation of the power to the ICC to exercise jurisdiction or other States Parties when either the crime is committed in the territory of a State Party or when the accused is a national of a State Party justifies the exercise of jurisdiction over nationals of non-States Parties.

Moreover, the jurisdictional provisions of the ICC's Statute¹⁸⁷ do not make the jurisdiction of the Court dependent on the crime, as, for instance, the Torture Convention does. The Torture Convention provides that a State can exercise its jurisdiction if the alleged offender is found in its territory.¹⁸⁸ In this way, the ICC's Statute does not support the argument based on the exercise of universal jurisdiction as the Torture Convention does. The jurisdiction of the

para 110 (Djibouti); ibid p 309 para 79 (Cameroon); ibid p 303 para 164 (Jordan); ibid p 302 para 138 (Malta); ibid p 302 para 143 (Romania); ibid p 300 para 92 (Liechtenstein); p 298 para 60 (Sierra Leone); ibid p 342 para 73 (Portugal); ibid p 330 para 42 (Belgium); ibid 328-29 para 23 (Portugal); ibid 316 para 25 (Bosnia and Herzegovina).

¹⁸³ Schabas and Williams (n 180) 549–50.

¹⁸⁴ ICC Statute (n 135) art 12(2)(a).

¹⁸⁵ ibid arts 12(2) and 13(b).

¹⁸⁶ Malcom Evans (ed), *International Law* (OUP 2003) 652–72; Akande (n 72) 622.

¹⁸⁷ ICC Statute (n 135) arts 12-3.

¹⁸⁸ Torture Convention (n 65) art 5(2).

ICC over nationals of States Parties or nationals of non-States Parties for crimes committed in the territory of States Parties supports the argument based on a delegation of the power of the States Parties to exercise jurisdiction.

That said, the ICC Statute does not regulate the jurisdiction of national courts or oblige States to prosecute offenders as States only have an obligation to cooperate with the ICC¹⁸⁹. The duty of States to prosecute offenders of international crimes is a general provision reiterated in the Preamble of the Statute, which should be considered in the context of the complementarity of the ICC's jurisdiction¹⁹⁰. Investigations and prosecution by the ICC are based on the complementarity principle¹⁹¹ and the failure of a State Party which has jurisdiction over the crime, ie to investigate or prosecute the offender, may result in an investigation and prosecution by the ICC.

Nevertheless, the ICC's Statute can be construed to support the right of States to the exercise of universal jurisdiction to prosecute nationals of other States Parties or nationals of other States for crimes committed in the territory of other States Parties.¹⁹² This interpretation is in line with the duty of States to prosecute offenders of international crimes and the object and purpose¹⁹³ of the ICC Statute which calls for ending impunity of offenders of international crimes¹⁹⁴. Moreover, Some States in their implementing legislations allow for the exercise of universal jurisdiction over nationals of non-States Parties for crimes committed outside the territory of the States Parties¹⁹⁵. The inclusion of universal jurisdiction in the implementing

¹⁸⁹ ICC Statute (n 135) arts 86-7.

¹⁹⁰ *ibid* para 6 of the Preamble.

¹⁹¹ *ibid* arts 17 (1)(a) and 17(1)(b).

¹⁹² Nicolaos Strapatsas, 'Universal Jurisdiction and the International Criminal Court' (2002) 29 *Man LJ* 1.

¹⁹³ VCLT (n 137) art 31(1).

¹⁹⁴ ICC Statute (n 135) paras 5 and 6 the Preamble.

¹⁹⁵ Canada: Crimes Against Humanity and War Crimes Act (SC 2000, c 24) art 8 (b) Canadian courts could prosecute on the basis of universal jurisdiction if the perpetrator is present in Canada; Netherlands: International Crimes Act 2003 s 2(1)(a) requiring the presence of the perpetrator in the Netherlands for the purposes of investigation and prosecution; David Turns, 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States', *The Permanent*

legislations goes above and beyond the jurisdiction provisions of the ICC's Statute¹⁹⁶.

Moreover, the rejection of the proposals by States to include universal jurisdiction in the ICC's Statute can also be considered in the light of the fact that the ICC's Statute revokes personal immunities of officials¹⁹⁷. Accordingly, the exercise of universal jurisdiction by the ICC in situations which would have included officials of non-States Parties enjoying personal immunity for crimes committed outside the States Parties could have been inconsistent with Article 34 of the Vienna Convention on the Law of Treaties (VCLT)¹⁹⁸.

Perhaps, from a broader perspective, the rejection of the duty to the exercise of universal jurisdiction by the ICC can also be explained because the exercise of universal jurisdiction would have *obliged* the ICC to prosecute offenders and would have created parallel obligations for States Parties to cooperate with the ICC. Put differently, the *obligation* to cooperate with the ICC to prosecute offenders would have been an elevation of the rules of universal jurisdiction, in contrast to the *right* of States to exercise universal jurisdiction based on violations of *erga omnes* obligations.

In light of the considerations mentioned above, it can be concluded that the ICC's Statute is neutral with regards to the argument justifying the exercise of universal jurisdiction by States based on violations of *erga omnes* obligations. This chapter only proposes the right of States to exercise universal jurisdiction based on violations of *erga omnes* obligations and does not argue that States are obliged to exercise universal jurisdiction.¹⁹⁹

As discussed, some States Parties' implementing legislations allow their courts to

International Criminal Court: Legal and Policy Issues (Hart 2004) 341–52; International Criminal Court Act 2001, c 17 s 51(2) and s 23(2) only excludes officials of non-States parties unless waiver of the immunity is given by the State of the nationality of offender.

¹⁹⁶ ICC Statute (n 135), arts 12–13.

¹⁹⁷ *ibid* art 27, also see Chapter 5.

¹⁹⁸ VCLT (n 137), Chapter 5 discusses personal immunities of officials under the ICC Statute in more detail.

¹⁹⁹ Roozbeh (Rudy) B Baker, 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment' (2009) 16 *ILSA JIntl& CompL* 141, 148 The views asserted in this chapter are in line with the limited interpretation of universal jurisdiction.

exercise universal jurisdiction. Accordingly, there are calls to subject the exercise of universal jurisdiction by the States Parties to a Review Board to overcome the incoherent application of the exercise of universal jurisdiction by national authorities²⁰⁰. The task of the Review Board would be to oversee the exercise of universal jurisdiction by the States Parties according to pre-determined conditions, while it can also issue binding decisions for States.²⁰¹ This proposal undoubtedly is a positive step towards formulating a more coherent exercise of universal jurisdiction by at least the States Parties. However, in practice, this proposal is unlikely to be endorsed by States as it would require an amendment to the Rome Statute and an increase in the ICC's budget. The ICC is set up on the complementarity principle and considering the resources made available to the ICC, it can only try a limited number of cases²⁰². The practical hurdles of this proposal are not only limited to a budgetary increase for the ICC but also include a comprehensive agreement on the factors to be taken into account by the Review Board in delivering its binding decisions regarding the exercise of universal jurisdiction by States.

5.2. Incoherent Application of Universal Jurisdiction by National Authorities

One may argue that since there is disagreement over the ambit of the exercise of universal jurisdiction (ie *in absentia* exercise of universal jurisdiction or issuance of international arrest warrants) (Section 4.1) this may lead to inconsistent application of the exercise of universal jurisdiction by national courts. In other words, since the application and interpretation of the exercise of universal jurisdiction are at the discretion of national jurisdiction authorities rather than an international court delegated to exercise jurisdiction based on its statute²⁰³ this may lead to the incoherent application of universal jurisdiction. The

²⁰⁰ Dalila Hoover, 'Universal Jurisdiction Not So Universal: Time to Delegate to the International Criminal Court' (2011) 8 *Eyes on the ICC* 73, 102–5.

²⁰¹ *ibid.*

²⁰² William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *HarvInt'l LJ* 53, 54.

²⁰³ Ben-Ari (n 97) 171.

incoherent applications could include the conditions attached to the exercise of universal jurisdiction, the crimes which give rise to universal jurisdiction, and the inapplicability of personal immunity of officials.

That said, the examples of Belgium, Spain, and the UK, indicate that States will ultimately adopt an understanding of the exercise of universal jurisdiction which is widely shared by the majority of States. With regards to the rule of jurisdiction this shared understanding is ultimately dependent on two sets of rules in international law, ie the duty of non-intervention and the rules of immunity.

Under UK law, the courts can prosecute offenders on the basis of universal jurisdiction when the perpetrator is present in the territory of the UK.²⁰⁴ The governmental authorisation (attorney general) was required for the prosecution of offenders on the basis of universal jurisdiction.²⁰⁵ However, in England and Wales individuals were permitted to initiate criminal proceedings and apply for arrest warrants.²⁰⁶

In respect of the exercise of universal jurisdiction, this entailed that private parties could have applied directly to courts to institute criminal proceedings. This prompted a series of *in absentia* proceedings leading to the issuance of arrest warrants against Israeli officials who enjoyed either functional or personal immunity²⁰⁷. Subsequently, the law was amended, primarily due to the political ramifications of the arrest warrants issued as a result of the proceedings initiated by private parties. Accordingly, proceedings based on the exercise of universal jurisdiction are now subject to the consent of the Director of Public Prosecutions²⁰⁸.

Moreover, as a matter of fact, both Belgium and Spain, which had allowed their courts to exercise an unconditional form of universal jurisdiction, have repealed their laws to allow

²⁰⁴ International Criminal Court Act 2001 (n 195) s 51 and 68.

²⁰⁵ Geneva Conventions Act 1957 s 1(A)(3); Criminal Justice Act 1988, c 33 s 135; War Crimes Act, 1991, c. 13, s 1(3); International Criminal Court Act 2001 (n 195) s 53(3).

²⁰⁶ Prosecution of Offences Act, 1985, c. 23, s 6(1).

²⁰⁷ Langer (n 23) 17–8.

²⁰⁸ Police Reform and Social Responsibility Act 2011 s 153.

for a conditional exercise of universal jurisdiction²⁰⁹. Both Belgian and Spanish courts had held that universal jurisdiction could be exercised *in absentia*.²¹⁰ Accordingly, had the requirement of the presence of the offender in the territory of the forum State been observed, the proceedings initiated in Spain and Belgium targeting Israeli and US officials would have been struck out of these courts.

In the case of Belgium, the 1993 Belgian law did not even require the presence of the accused in Belgium to initiate criminal investigation proceedings (genocide, crimes against humanity and war crimes) and it did not recognise the immunities of officials under international law.²¹¹ Both points mentioned above (presence of the perpetrator in the territory of Belgium²¹² and personal immunities²¹³) have been addressed in the 2003 Belgian law. The 2003 Belgian law requires the habitual residency of the accused in its territory and that the federal prosecutor could only initiate the proceedings.²¹⁴

Likewise, the repealed Spanish law also allows for the exercise of universal jurisdiction by Spanish courts if the perpetrator is present in Spain²¹⁵ which includes crimes of genocide, war crimes and crimes against humanity.²¹⁶ The correct interpretation of Spain's and Belgium's

²⁰⁹ Turns (n 195) 366.

²¹⁰ *Re Sharon and Yaron* (n 141); *Audiencia Nacional, Auto del Juzgado Central de Instrucción* No 4 (2008) p 157; Ben-Ari (n 97) 181–82.

²¹¹ Belgium: Act of 10 February 1999 on the Punishment of Grave Breaches of International Humanitarian Law arts 1(1)-3, 5 and 7; Amnesty International, 'Universal Jurisdiction' (n 65) 30–31; Baker (n 199).

²¹² Belgium: Act of 23 April 2003 on the Act concerning Punishment for Grave Breaches of International Humanitarian Law (reproduced in International Legal Materials, vol 42 (2003) pp 1258-1283 art IV (A)(2)(a).

²¹³ Belgium: Act of 5 August 2003 Concerning Punishment for Grave Breaches of International Humanitarian Law (moniteur Beige, Aug. 7, 2003) art 13; Baker (n 199) 165–166.

²¹⁴ Belgium: Act of 23 April 2003 (n 212) arts 4,6,7 and 10; Belgium: Code of Criminal Procedure 2006 arts 6,7,10,11 and 12bis; Belgium: Act of 5 August 2003 (n 213) Belgian court can exercise trials in absentia only if there is a territorial link with Belgium (ie the victim is a Belgian national or a permanent resident [3 years minimum residency]; Iain Cameron, 'Chapter 3: Jurisdiction and Admissibility Issues Under the ICC Statute' in Dominic McGoldrick, Eric Donnelly and Peter Rowe (eds), *The Permanent International Criminal Court: Legal and Policy Issues* [Hart 2004] 81.

²¹⁵ Spain: Organization Act No. 1/2009 of 3 November art 1.

²¹⁶ UNGA Sixth Committee, 'The Scope and Application of the Principle of Universal Jurisdiction: Information Provided by Spain' (2013) A/68/113.

practice is that both states adopted a conditional approach to the exercise of universal jurisdiction which adheres to an understanding of the exercise of universal jurisdiction shared by the majority of States, rather than abolishing the exercise of universal jurisdiction by repealing their laws.

As the example of Belgium illustrates, the fact that the disputable nature of universal jurisdiction in international law may lead to violations of rules of personal immunity²¹⁷ or lead to other violations of international law may not necessarily be the case in the long run as States are reminded of their obligations under international law. This was the case regarding a dispute over immunity of the incumbent Foreign Minister of Congo between Belgium and Congo, where Belgium was held to be in violation of its international obligations by the ICJ for issuing a non-binding international arrest warrant against an official who enjoyed personal immunity²¹⁸. As discussed, Belgium repealed its law on universal jurisdiction to recognise the personal immunity of officials.²¹⁹

Accordingly, if a State aims to exercise universal jurisdiction, it is the responsibility of the State to ensure that its procedures and rules are compatible with the requirements of international law²²⁰. If there are disagreements over the application of the exercise of universal jurisdiction over international crimes, there are avenues through which State may resort to settle their disputes.

There is also the argument that since there is disagreement as to the crimes which give rise to universal jurisdiction²²¹, the exercise of universal jurisdiction may lead to inconsistent application of international crimes in different national courts. As contended, the interpretation and application of the rules of universal jurisdiction by States may initially lead to some

²¹⁷ Ben-Ari (n 97) 170–71.

²¹⁸ *Arrest Warrant* (n 5).

²¹⁹ Belgium: Act of 5 August 2003 (n 213) art 13.

²²⁰ Langer (n 23) 15–9.

²²¹ Colangelo (n 43) 130.

inconsistent practice in their application. The same argument is also applicable with respect to crimes recognised by States as those which can give rise to universal jurisdiction. Chapter Two considered the creation of international crimes in customary international law from a constructivist perspective. Although Chapter Two did not propose a list of recognised international crimes in customary law, it enumerated some crimes which have a strong claim to be recognised as customary law.

However, the inconsistency in application and interpretation of the exercise of universal jurisdiction may not necessarily arise if the exercise of universal jurisdiction, as proposed here, is based on the proposed conditions to the exercise of universal jurisdiction. The proposed criteria for the recognition of crimes which entitle States to exercise universal jurisdiction, recognition of amnesties endorsed by the international community and the recognition of the potential commission of crimes by international bodies to some extent rectify the deficiencies of the exercise of universal jurisdiction considered here. As discussed, States are permitted to exercise universal adjudicative jurisdiction over offenders for violations of international crimes if the perpetrator is present in the territory of the forum State and States can issue non-binding international arrest warrants for violations of international crimes subject to the rules of immunity of officials in international law.

Finally, there is the argument that the disparity of power between States could lead to the abuse of the principle of universal jurisdiction. In other words, weaker States may utilise it as a political tool for retaliation against the more powerful States while the more powerful States may utilise it as a political tool to achieve their political objectives by pressuring the weaker States, thereby creating instability in inter-State relations²²².

The fact that a power disparity between States could induce States to utilise the exercise

²²² Robinson (n 142) 49 Lord Browne-Wilkinson; Steven R Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 AJIL 888, 893.

of universal jurisdiction to achieve political objectives does not provide a sound argument against the right of States to exercise universal jurisdiction based on *erga omnes* violations. The exercise of universal jurisdiction expounded here is based on the interests of the international community, which are perceived as legitimate and can be identified in customary rules giving rise to obligations *erga omnes*.

Inevitably there is the likelihood of the politicisation of any legal right or obligation; however, the requirement of the recognition of the potential commission of international crimes by international organs as a condition on the exercise of universal jurisdiction precludes violations of international law (ie duty of non-intervention). Accordingly, even if there are political motives behind the exercise of universal jurisdiction, the conditions proposed here ensure that that exercise is conducted within a boundary permitted by international law.

The proceedings against Israeli officials initiated in Belgium and Spain did not fulfil the conditions on the exercise of universal jurisdiction proposed here, yet, these proceedings did not destabilise inter-State relations to an unmanageable level which could justify the abolishment of the exercise of universal jurisdiction. The protests were mostly limited to verbal disagreements by Israeli politicians with the proceedings in the case of Spain or refraining from travelling to the UK in the case of proceedings in the UK rather than actions by Israel which would have endangered international peace and security²²³.

Moreover, since the exercise of universal jurisdiction arising from the violations of *erga omnes* obligations is a *right* rather than a duty, which has been made subject to governmental approval by many States, a level of inconsistency may nevertheless occur. States may choose to prosecute offenders from less powerful States as they have fewer resources to impose political costs on the forum State. However, the fact that universal jurisdiction may be subject to this kind of selectivity cannot be used to rebut the right of States to exercise universal

²²³ Ben-Ari (n 97) 184, 188–89.

jurisdiction since when States choose to exercise universal jurisdiction they have to do so within the limits imposed by international law. Indeed, the position of the AU illustrates the selectivity which may arise in exercising universal jurisdiction by States. In this regard, although the AU has called on States to relinquish the practice of universal jurisdiction over African nationals, it has recognised the universal jurisdiction as a principle of international law²²⁴.

6. Conclusion

The exercise of jurisdiction by States should be subject to prohibitive rules of international law such as the duty of non-intervention and rules of immunity. The prohibitive rules of international law apply individually to all three forms of jurisdiction – ie prescriptive, adjudicative and enforcement jurisdiction. Both the prohibitive approach which only takes into account the prohibitive rules of jurisdiction and the permissive approach to the rules of jurisdiction were rejected (Section 2). The exercise of universal jurisdiction on the basis of *erga omnes* violations is justified if it does not violate the duty of non-intervention and other prohibitive rules of international law (Sections 3.1 and 3.2).

The entitlement of States to assert universal jurisdiction over violations of *erga omnes* obligations is the fact the State with a closer link to the offence not only has failed to prevent the crime but also subsequently failed to prosecute the offenders (Section 3.2). The entitlement of States arising from *erga omnes* violations is similar to the subsidiarity principle and is the basis for the exercise of jurisdiction by many States (Section 3.2).

The exercise of universal jurisdiction should be subject to an interpretation of the duty of non-intervention which takes into account the interests of the international community (Section 3.1). Accordingly, the exercise of universal jurisdiction by States should take into

²²⁴ African Union, ‘Decision on the Abuse of the Principle of Universal Jurisdiction’ (n 73); African Union, ‘Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction’ (n 73).

account procedural legitimacy factors, on the basis that a State is acting as a trustee of the international community, protecting the interests of the international community (Section 3.2). It is on this basis that the recognition of a potential commission of a crime by an international organisation or institution enhances the claim of the prosecuting States and weakens the claim of the duty of non-intervention by the State with the closer link to the offence or the offender (Section 3.2). By the same token, national courts should recognise the amnesties endorsed by the international community (3.2).

The presence of the accused in the territory of the forum State for the purpose of the exercise of the adjudicative and enforcement jurisdiction establishes a link between the prosecuting State and the accused. This link prevents the violation of the duty of non-intervention but is still subject to other prohibitive rules under international law such as rules of immunity of officials (Section 4.1). States are allowed to exercise prescriptive and adjudicative (ie issuing non-binding arrest warrants) universal jurisdiction *in absentia* subject to the rules of immunity of officials. However, States are not allowed to exercise adjudicative and enforcement jurisdiction, ie trial, *in absentia* (Sections 4.2 and 4.3).

This chapter also argued that community interests (the legitimacy of norms) justify the exercise of universal civil jurisdiction. States will not violate the duty of non-intervention under international law if they exercise universal civil jurisdiction (Section 3.3). The exercise of adjudicative jurisdiction in criminal proceedings is subject to the presence of the offender in the territory of the forum State to prevent the duty of non-intervention. Accordingly, civil proceedings should also be subject to a link between the forum State and the offender (eg assets in the forum State or presence in the forum State) (Section 4.1).

The arguments put forward against the exercise of universal jurisdiction were also considered here (Section 5). This chapter did not argue that the exercise of universal jurisdiction does not have deficiencies; rather, it proposed that if the exercise of universal

jurisdiction by States is in line with the proposed conditions this will reduce some the risks involved in the exercise of universal jurisdiction. The proposed conditions include the presence of offender in the territory of the forum State for the purpose of adjudicative and enforcement jurisdiction, the application of the rules of immunity, recognition of amnesties endorsed by the international community to the exercise of universal jurisdiction and the requirement of recognition of potential commission of crimes by international organisation and institutions.

As discussed, States' exercise of jurisdiction is subject to the prohibitive rules of international law, and these conditions are to prevent the breach of the prohibitive rules of international law (eg the duty of non-intervention). The coherent application of universal jurisdiction by States is primarily dependent on the incorporation of the proposed conditions in the domestic laws of States. As discussed, the examples of Belgium and Spain indicate that States may initially apply universal jurisdiction in ways which are inconsistent with the requirements of the international law but they will eventually adopt laws which are in line with the requirements of international law.

Chapter Four: Functional Immunity and International Crimes

1. Introduction

This chapter contends that functional immunity is not available to officials in respect of international crimes. This discussion is limited to the prosecution of officials on the basis of universal jurisdiction¹ and the crimes under customary international law which give rise to the dual responsibility of States and individuals.² This chapter begins by considering the link between the exercise of (universal) jurisdiction and the rules of functional immunity, ie that rules of jurisdiction do not necessarily determine the outcome of functional immunity and vice versa (Section 2).

International crimes justify withholding the functional immunity of officials who have committed acts which gave rise to both State and individual responsibility (Section 3.1). The rebuttal of functional immunity can be justified because functional immunity in international law is granted to officials, both for the benefit of their home State and officials (Sections 3.2 and 3.4). A strand of State practice which exempts the commission of international crimes from the operation of the rules of functional immunity supports this finding (Section 3.3).

States intervention in proceedings against their officials in terms of discerning private from official conduct can be influential. However, this is not sufficient to justify that functional immunity is solely owed to the State, as this would overlook the official's right to be protected under functional immunity as a separate entity from their home State (Section 3.2). The arguments made in this chapter with respect to functional immunity of officials are different from those based on *jus cogens* status of some crimes in international law (Section 3.1).

Rules of attribution do not necessarily determine the outcome of the functional

¹ See Chapter Three.

² ILC Yearbook 1994, A/CN.4/SER.A/1994/Add.1 (Part 2) 36,41 and 55; Edward M Wise and Ellen S Podgor (eds), *International Criminal Law: Cases and Materials* (Matthew Bender & Co 2000) 1–5, 496.

immunity of officials (Section 4). First, on the basis of legal (limitations on the applicability of the rules of attribution to functional immunity) and non-legal considerations it is argued that, the commission of international crimes by officials cannot be categorised as private acts (Section 4.1). Secondly, application of the rules of attribution to functional immunity of officials excludes the possibility that both States and their officials could be held accountable under international law for the same acts (Section 4.2).

Thirdly, application of the rules of attribution to functional immunity cannot justify the absence of functional immunity for crimes committed in the territory of the forum State under the authority of their home State (Section 4.4). Finally, rules of attribution make an artificial distinction between civil and criminal proceedings and cannot justify the unavailability of functional immunity to officials in civil proceedings with respect to international crimes (Section 4.5).

2. Immunity of Officials and Universal Jurisdiction

This section argues that while there is a connection between the rules of jurisdiction and immunity, they are intrinsically distinct. The traditional bases of jurisdiction seek to achieve a balance between the right of the State seeking to exercise jurisdiction and the right of the other State, which might be affected as a result of the exercise of jurisdiction by the former (Chapter 3). Similarly, the rules of immunity seek to achieve the same balance between States but from the opposite perspective.³ From this perspective, rules of jurisdiction and immunity are related but different,⁴ and if

jurisdiction is concerned with the exercise by a State of its competence to prescribe, adjudicate or enforce laws, the concept of immunity seems to seek to achieve a reverse outcome, namely the avoidance of the exercise of jurisdiction and a refusal to satisfy an otherwise legally sound and enforceable claim in a

³ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 815, 827.

⁴ ILC, 'Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction: By Special Rapporteur Roman Anatolevich Kolodkin' (29 May 2008) A/CN.4/601 para 102.

proper jurisdiction.⁵

Hence, the rules of immunity and jurisdiction share the same rationale by seeking to balance the rights of the States involved.

Despite the fact that the concepts of jurisdiction and immunity are closely related in international law due to their function, the rules of jurisdiction always precede immunity.⁶ It was contended in Chapter 3 that, to consider the operation of the rules of jurisdiction, one has to consider the prohibitive rules of international law, such as the duty of non-intervention and the rules of immunity. This is the second link between the rules of immunity and jurisdiction. In other words, the existence of (universal) jurisdiction does not necessarily entail the absence of immunity.

To consider the link between the rules of immunity and rules of jurisdiction, one should take into account different forms of jurisdiction, ie prescriptive, adjudicative and enforcement. This should be done for two reasons. First, the level of intervention in the affairs of the State implicated is tied to the form of the exercise of jurisdiction. Secondly, the form of jurisdiction has different implications for the rules of immunity of officials.

It was argued that States are entitled to exercise adjudicative and enforcement universal jurisdiction on a subsidiarity basis if the accused is present in the territory of the forum State, subject to the rules of immunity. It also proposed that States are entitled to exercise prescriptive and adjudicative universal jurisdiction *in absentia* over foreign officials if the exercise of jurisdiction does not have the potential to lead to an arrest warrant (ie pre-trial investigations).⁷ In the same vein, States are entitled to exercise prescriptive and adjudicative universal jurisdiction *in absentia* to issue non-binding arrest warrants in the absence of the application

⁵ ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat' (31 March 2008) A/CN.4/596 para 14.

⁶ *Arrest Warrant of 11 April 2000 (Congo v Belgium)* [2002] ICJ Rep 3 [46].

⁷ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 [191]; ILC, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction: by Special Rapporteur Roman Anatolevich Kolodkin' (10 June 2010) A/CN.4/631 para 48.

of the rules of immunity.

The second link between the rules of immunity and jurisdiction indicates that the exercise of universal jurisdiction is *partially* dependent on the rules of immunity. Put differently, the exercise of prescriptive and adjudicative jurisdiction (in the initial stages) does not mean the absence of immunity⁸ but that the right to exercise adjudicative (trial) and enforcement jurisdiction entails the absence of immunity.⁹ In other words, the rules of immunity control the operation of the rules of adjudicative and enforcement jurisdiction. This is in line with the contention of the ICJ in *Arrest Warrant*. In other words, the exercise of universal jurisdiction in no way affects the immunities under customary international law and that the existence of a right to exercise universal jurisdiction does not conclude the absence of immunity.¹⁰

Similarly, the absence of immunity does not also lead to the existence of jurisdiction. An official enjoying immunity may not enjoy immunity for the acts in question, but it does not follow that all States have jurisdiction over the official for those acts. Simply put, the issue of the immunity of a State or its officials does not arise if jurisdiction cannot be established;¹¹ ie there is a nexus between the forum State and the offence or offender which is governed by the rule of non-intervention. In respect of universal jurisdiction, it was asserted that the exercise of universal jurisdiction is subject to certain conditions to avoid a breach of the duty of non-intervention.

If it is held that the exercise of jurisdiction does not infringe the duty of non-intervention, only at that point will the rules of immunity have to be considered. There can be ‘no rejection of an immunity in international law by the forum State’s court without a prior

⁸ Xiaodong Yang, ‘*Jus Cogens* and State Immunity’ (2006) 3 NZYIL 131, 146; Kate Parlett, ‘Immunity in Civil Proceedings for Torture: The Emerging Exception’ [2006] EHRLR 49, 55.

⁹ Zachary Douglas, ‘State Immunity for the Acts of State Officials’ (2012) 82 BYBIL 281, 286.

¹⁰ *Arrest Warrant* (n 6) [66–8].

¹¹ Yang (n 8) 162.

assertion of adjudicative competence by that court'.¹² The non-consideration of the rules of jurisdiction prior to consideration of the rules of immunity is referred to as one of the misconceptions on the law of State immunity that has unnecessarily contributed to the complexity of understanding the immunity of officials.¹³

The fact that jurisdiction partly precedes immunity has led some to contend that the existence of jurisdiction translates to the absence of immunity and, in respect of international crimes, the existence of the right/duty to exercise universal jurisdiction translates to the absence of immunity of foreign officials.¹⁴ For instance, Akande and Shah argue that a newer rule in international law which provides for (universal) jurisdiction overrides the older rule of (functional) immunity in international law, as the rules of immunity and jurisdiction are co-extensive. In other words, the proper legal effect cannot be given to the newer rule providing for (universal) jurisdiction if immunity persists.¹⁵ They argue that the 'principle of universal jurisdiction over certain international crimes is inconsistent with immunity *ratione materiae*; it follows that type of immunity does not exist in relation to those crimes whether in civil or criminal cases'.¹⁶

Moreover, Orakhelashvili views the rules of State immunity through the prism of the rules of jurisdiction, contending that there is no specific rule of international law which defines

¹² Douglas (n 9) 299.

¹³ *ibid* 286.

¹⁴ *Regina v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* (House of Lords) (24 March 1999) [2000] 1 AC 147, 119 ILR 136 Lord Hope (225, 235 and 246); David S Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the *Yerodia* Judgement as It Pertains to the Security Council and the International Criminal Court' (2004) 20 AmUInt'l LRev 7, 21; Melinda White, '*Pinochet*, Universal Jurisdiction, and Impunity' (2000) 7 SwJL& Trade Am 209, 215–23; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 AJIL 407, 415; also see Institute of International Law (17th Commission), 'Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes: Rapporteur Christian Tomuschat' (2005) 136–37: art 6 essentially provides that the existence of universal jurisdiction is not connected to the issue of immunities.

¹⁵ Akande and Shah (n 3) 841, 852.

¹⁶ *ibid* 849; Andrew Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2013) 62 ICLQ 193, 221–22.

the scope of the acts for which immunity should be granted.¹⁷ According to this understanding, jurisdiction persists unless a separate rule as an exception to the rules of jurisdiction is shaped to rebut the presumption of immunity.¹⁸ As discussed, there is a connection between the rules of immunity and jurisdiction with regards to their function. Both seek to achieve a balance between the rights of the States involved, but consideration of the rules of immunity only succeeds consideration of the duty of intervention with respect to the rules of jurisdiction. There is a third aspect in relation to the rules of immunity and jurisdiction which might create misunderstanding as to their connection.

The rules of immunity must be considered separately and are only considered once it has been established that the form of the exercise of universal jurisdiction does not infringe the duty of non-intervention. This, as will be shown in this chapter, is because the rationales behind universal jurisdiction and the absence of functional immunity are quite similar; crimes in customary law give rise to the obligations *erga omnes*. Consequently, if it is accepted that the rules of universal jurisdiction in some respects are coextensive with the rules of immunity, this could be because there may be an indirect link between them. The operation of both the rules of jurisdiction and immunity may be dependent on the status of the act in question: as an act which has reached the status of a crime in customary international law, rather than being linked together directly. This is important since the act is inherent in both, and that identification of an act as a crime is central to both. The ILC has argued that if ‘immunity is incompatible with the [adjudicative and enforcement exercise of] universal jurisdiction, then it is not fully clear why this should not relate not only to functional but also to personal immunity’.¹⁹ The rationale which applies to functional immunity does not apply to the personal immunity of high-ranking

¹⁷ Alexander Orakhelashvili, ‘State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights’ (2002) 15 LJIL 703, 249.

¹⁸ *ibid.*

¹⁹ ILC, ‘Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction’ (n 7) para 77.

officials and States (Chapter 5).

On the basis that jurisdiction at least partially precedes immunity and that they have similar underlying rationales (balancing the rights of the different States involved), it is contended that the operation of the rules of jurisdiction is partially dependent on the rules of immunity. The link between the existence of the right to exercise adjudicative and enforcement universal jurisdiction is the status of the act as a crime in customary law which gives rise to the dual responsibility of the State and individual. Accordingly, neither the approach which ties immunity to jurisdiction, nor the approach that views the operation of rules of immunity and jurisdiction as completely separate can be accepted as a valid description of their link and operation.

3. Functional Immunity of Officials

3.1. Functional Immunity and International Crimes

It is argued that functional immunity is based on two rules: first, on the distinction between official and non-official conduct;²⁰ and secondly, on the prohibitive rules of international law.²¹ Prohibitive rules of international law in the context of the rules of immunity include rules of non-intervention and international crimes. While both rules of jurisdiction and immunity seek to achieve a balance between the rights of the States involved, the rules of immunity also have an aspect in relation to officials which must be taken into consideration.

Functional immunity is based on the notion that one State may not sit in judgment of

²⁰ *ibid* 102.

²¹ Note also that the US courts have not generally considered that government's official legitimate authority includes a right to conduct official acts that violate international law; *Enahoro v Abubakarr*, 408 F 3d 877 (7th Cir 2005) 893; *Siderman de Blake v Argentina*, 965 F2d 699 (9th Cir 1992) 103 ILR 455 718; *Paul v Avril*, 812 F Supp 207 (SD Fla 1993) 212; *Compare Sarei v Rio Tinto*, 487 F 3d 1193 (9th Cir 2007) 1209; *In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v Estate of Marcos*, 25 F 3d 1467 (9th Cir 1994) 104 ILR 120 1472; *Ye v Zemin*, 383 F3d 620 (7th Cir 2004) 626–27; *Samantar v Yousuf*, 699 F3d 763 (4th Cir 2012) 21–2; Harold Hongju Koh, 'Foreign Official Immunity After *Samantar*: A United States Government Perspective' (2011) 44 *VandJTransnat'l L* 1141, 1153.

another State's acts (State aspect)²² and that States refrain from attributing personal responsibility (whether in criminal or civil proceedings) for the acts of officials carried out in an official capacity (individual aspect).²³ The objective of the rules of functional immunity is not only to protect the State from non-intervention in their affairs, but also to protect individuals associated with the State from being held personally accountable for conduct carried out in the course of their official duties. In this respect, even if the act is conducted under the authority of the home State – ie part of official functions – functional immunity can be rebutted if the act is prohibited both for States and individuals.

If the act is committed in the territory of the forum State and is prohibited by international law or, in another word, it breaches the duty of non-intervention in the affairs of the forum State, which generally refers to criminal acts under the domestic law of the forum State²⁴ without the consent of the forum State (eg kidnapping or murder),²⁵ functional immunity is not available. On the other hand, if the act is committed outside the territory of the forum State, then generally the duty of non-intervention in the affairs of the forum State is inapplicable. In those situations, the illegality of the act both for the individual and the State must emanate from international law (ie international crimes which give rise to obligations

²² Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 537; *Pinochet (No 3)* (n 14) Lord Browne-Wilkinson (201), Lord Millet (268); Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 117; ILC, 'Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction: by Special Rapporteur Escobar Hernández' (29 May 2015) A/CN.4/686 para 23.

²³ ILC, 'Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction' (n 22) para 105; Alebeek (n 22) 156; Douglas (n 9) 324.

²⁴ Akande and Shah (n 3) 827: 'immunity *ratione materiae* is a device which balances the competing interests of states involved by preventing undue interference in the affairs of other states'.

²⁵ The legality or illegality of a conduct in domestic law does not necessarily determine the outcome of the functional immunity of officials; *Jaffe v Miller and Others* (Ontario Court of Appeal) [1993] 95 ILR 446460; *Zhang v Jiang Zemin and Others* (2010) 148 ILR 555 (Australia, New South Wales Court of Appeal); *Fang and Others v Jiang Zemin and Others* (New Zealand High Court) (2006) 141 ILR 702; *Estate of Late Kazemi and Hashemi v Islamic Republic of Iran and Others* (Quebec Superior Court) (2011) 147 ILR 318; *United States of America, et al v Luis R Reyes, et al*, GR No79253 (Supreme Court of the Philippines, 1 March 1993); *Pinochet (No 3)* (n 14) Lord Millet 270; *ibid* Lord Browne-Wilkinson 203.

erga omnes) to revoke the immunity of the official. Hence, it could be contended, contrary to the belief of some, that the operation of rules of functional immunity does not impede the operation of international crimes.²⁶

To prove these assertions, the claims that acts, even if conducted in an official capacity, do not enjoy immunity in those two circumstances are proved by two main arguments. First, the unavailability of functional immunity in respect of international crimes is consistent with the nature of functional immunity, which is to provide protection to the official and prevent interference in the affairs of the home State of the official. Since both the State and individuals are beneficiaries of the rules of functional immunity, the prohibition which can rebut the plea of functional immunity should address both aspects of functional immunity. Secondly, the outcome of judicial decisions regarding crimes committed inside and outside the territory of the forum State²⁷ supports these assertions. Finally, the rules of attribution do not justify the operation of the rules of the functional immunity of officials in certain instances (Section 4).

3.2. Functional Immunity Embodies Dual Beneficiaries (States and Individuals)

It must be noted that whether the home State revokes or invokes the immunity of its official enjoying functional immunity should not be considered as a sufficient factor for rebuking functional immunity. Functional immunity is granted to officials both for the protection of the rights of the State (non-intervention) and the official as an individual, and thus the State cannot, on its own, revoke the functional immunity of its official. Additionally, the act is prohibited both for States and individuals. This does not negate the fact that a State might intervene in a proceeding to provide evidence as to whether the conduct of the official

²⁶ Alebeek (n 22) 163.

²⁷ Yang argues that, as far as 'State immunity is concerned, however, judicial decisions are now not a subsidiary but a principal means for the determination of rules of law': Xiaodong Yang, *State Immunity in International Law* (CUP 2012) 28.

was conducted in an official capacity or a private capacity.²⁸ Such evidence is, arguably, not determinative in relation to the functional immunity of officials, as international crimes do not attract functional immunity whether committed in a private or official capacity.²⁹ This also has to be differentiated, with the power of States as the primary subjects of international law, to create exceptions to the rules of immunity in international law and to waive the immunities of their officials.³⁰ The idea here is that domestic courts consider the plea of functional immunity of officials regardless of the intervention of the home State.

Some have considered that immunity *ratione materiae* belongs to the State and that officials do not have the right to invoke immunity *ratione materiae* on their own, since immunity only vests in the foreign State.³¹ However, the invocation of immunity on behalf of the official by the home State, or the home State joining the proceeding, does not necessarily determine the outcome of the plea of functional immunity.³² National courts may nevertheless consider a plea of immunity by the official regardless of the intervention of the home State of the official either in joining the proceedings or issuing a statement in defence of the official's actions.³³ It may be sufficient that the accused official raises the plea of immunity in the

²⁸ Alebeek (n 22) 131: the presumption of immunity which can be rebutted by the home State of the official.

²⁹ Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 EJIL 853, 870–72.

³⁰ UNGA, Rome Statute of the International Criminal Court, 17 July 1998 (last amended 2010); UNGA International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) A/RES/3068 (XXVIII); UNGA Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1985, entered into force 26 June 1986) 1465 UNTS 85 arguably implied a waiver of functional immunity; *Pinochet (No 3)* (n 14).

³¹ Douglas (n 9) 287.

³² *Hilao v Marcos* (n 21) [12–29]: although the Philippines had waived the immunity of the defendant, the US Court did not entirely base its decision on that waiver; *Kadic v Karadzic*, 70 F 3d 232 (2d Cir 1995) 104 ILR 136; *Zhang v Jiang Zemin* (n 25) [4–9]: China had not intervened in the against its former president -nevertheless the Australian Court considered the issue of functional immunity; *Swarna v Al-Wadi, Al-Shaitan and State of Kuwait* (Court of Appeals, 2nd Cir) (2010) 152 ILR 617; Yoram Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*' (1966) 15 ICLQ 76, 88–89.

³³ Alebeek (n 22) 131.

proceeding.³⁴ This practice of national courts also supports the contention that the rules of immunity are for the benefit of the State and officials.

Moreover, the ICJ's judgment in *Belgium v Senegal* and the House of Lords' decision in *Pinochet III* illustrate that invocation of immunity by the home State of the offender does not necessarily determine the outcome of the rules of immunity. In *Belgium v Senegal*, Belgium had requested the extradition of a former head of State from Senegal,³⁵ Mr Habré, who was the president of Chad from 1982 to 1990 and had allegedly committed large-scale violations of human rights, including torture,³⁶ during his tenure. Chad had lifted all immunities of its former head of State but Senegal had still declined to prosecute or extradite Mr Habré.³⁷ Although the ICJ found Senegal's ratification of the Torture Convention date as determinative of the initiation of Senegal's obligations under the Convention, the ICJ based its decision neither on the ratification of the Convention by Chad nor the waiver of immunity by Chad.³⁸ Moreover, Chad had not ratified the Torture Convention until 1995,³⁹ which was after the period which the alleged crimes occurred (1982-1990).

In *Pinochet III*, the Chilean government had not waived the immunity of its former official and, by intervening in the proceeding against Pinochet, it had argued that Pinochet as a former head of State enjoyed immunity in respect of official acts, contrary to domestic or international law.⁴⁰ Three Law Lords, in this case, held that the relevant date for loss of immunity of a former head of State was when all of the three States (Spain, UK and Chile)

³⁴ Israeli courts considered the issue of immunity of Eichmann regardless of the fact that Germany had not intervened in the proceedings; *Attorney General of the Government of Israel v Adolf Eichmann* (District Court of Jerusalem) (1961) 39 ILR 5; *Attorney General of the Government of Israel v Adolf Eichmann* (Supreme Court of Israel) (1962) 39 ILR 277; Dinstein (n 32) 87–88.

³⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422.

³⁶ *ibid* 16.

³⁷ *ibid* 20–22, 101–3: the ICJ found that Senegal was in violation of its obligation under the torture convention and did not tie these obligations to the lifting of immunities by Chad.

³⁸ *ibid* 101–3.

³⁹ Torture Convention (n 30).

⁴⁰ *Pinochet (No 3)* (n 14) Lawrence Collins QC for the Government of Chile 174.

involved had ratified the Torture Convention (8 December 1989).⁴¹

The Torture Convention can only be read implicitly to waive the functional immunity of officials. The Torture Convention does not make any explicit reference to the revocation of functional immunity of officials in respect of torture. It only makes reference to torture committed by officials⁴² but does not define the scope of immunities of officials. The majority of Law Lords drew this inference on the basis of the obligation to prosecute or extradite under the Torture Convention, which the Law Lords interpreted as implicitly waiving the functional immunities in respect of crimes of torture.⁴³ In other words, the relevant date was the date when the three States had recognised torture as a crime and impliedly waived the immunity of their officials.

Accordingly, whether the home State upholds the plea of immunity of an official or revokes the functional immunity of its official would not be a sufficient determinative factor in proceedings against officials enjoying functional immunity for international crimes. The purpose of functional immunity is to give protection to the individual as well as the State for official acts. However, if the forum court reaches the conclusion that functional immunity applies to the proceedings commenced ‘against the foreign State's officials (or former officials) then it follows that the proper defendant to the proceedings is the foreign State’.⁴⁴ The course of action for the forum court in such cases is to reject the claim against the official ‘as against the wrong defendant and simultaneously to decline jurisdiction against the foreign State on the basis of its immunity from that jurisdiction’ (if State immunity is applicable).⁴⁵

3.3. State Practice

There is also support for this approach in domestic judgments to immunity *ratione*

⁴¹ *ibid* Lord Browne-Wilkinson 205-206, Lord Hope 248.

⁴² Torture Convention (n 30) arts 1, 10, 16 and art 2(3) outlaws any defence of superior orders.

⁴³ *ibid*, arts 5 and 7; *Pinochet (No 3)* (n 14) Lord Browne-Wilkinson 247, Lord Hutton 262.

⁴⁴ Douglas (n 9) 287.

⁴⁵ *ibid*.

materiae in criminal proceedings⁴⁶ but this has been mostly rejected in relation to immunity *ratione personae*⁴⁷. There is also considerable evidence of other *indicia* of State practice that immunity *ratione materiae* is not applicable to international crimes.⁴⁸ Legal authorities have also supported the idea that officials do not enjoy immunity *ratione materiae* in respect of international crimes.⁴⁹

⁴⁶ *Pinochet (No 3)* (n 14) Lord Hutton 259-62, Lord Millet (277), Lord Phillips (289); *Ferrini v Federal Republic of Germany* (Supreme Court of Cassation) (2004) 128 ILR 659 [9.1] (immunity *ratione personae*); Vanessa Klingberg, '(Former) Heads of State Before International (Ized) Criminal Courts: The Case of *Charles Taylor* Before the Special Court for Sierra Leone' [2003] Germ Yrbk Intl L 537, 522-56; *Xuncax v Gramajo*, 886 F Supp 162 (D Mass. 1995); *Cabiri v Assasie Gyimah*, 921 F Supp 1189 (SDNY 1996); *Enahoro v Abubakarr* (n 21); *Eichmann (1961)* (n 34) [14(d)]; *Auto de solicitud de extradición de Pinochet* Madrid, 3 November 1998 157; L Barnhoorn, 'Netherlands Judicial Decisions Involving Questions of Public International Law, 1999-2000' (2001) 32 NYIL 233, 277; *Ould Dah* (Assize Court of Gard, 1 July 2005); *Ould Dah c France*, Requête no 13113/03, Council of Europe: European Court of Human Rights, 17 March 2009.

⁴⁷ *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another (Secretary of State for Constitutional Affairs and Another Intervening)* (House of Lords) (2006) 129 ILR 630 (aspect of immunity related to Saudi Arabia); *Hwang Geum Joo, et al, v Japan*, 332 F 3d 679 (DC Cir 2003) (Japan's immunity in respect of allegation of sexual slavery and torture); *Al-Adsani v Government of Kuwait and Others* (1996) 107 ILR 536.

⁴⁸ Some States which have implemented the ICC Statute have not retained the immunities of officials non-state party to the ICC (South Africa, Congo, Croatia); Croatia: Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts Against the International Law on War and Humanitarian Law of 4 November 2003, art 6(3); South Africa: Implementation of the Rome Statute of the International Criminal Court Act 2002, Act No 27 s 4; *Pinochet (No 3)* (n 14) Lord Hutton 259-62, Lord Millet (277), Lord Phillips (289); *A v Attorney General and Others* (Switzerland) 25 July 2012 the Swiss Federal Criminal Court refused to uphold a claim of immunity in a criminal case against an Algerian national for war crimes, including acts of torture, committed in Algeria.

⁴⁹ *Prosecutor v Tihomir Blaskic* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II) (ICTY, the Appeals Chamber) IT-95-14-AR108 [41]; *Kadic v Karadzic* (n 32) 151-56; *Arrest Warrant* (n 6) Separate Opinion of Judges Higgins, Buergenthal and Kooijmans [128], Dissenting Opinion of Judge Wyngaert [36]; African Union, 'The Report of the Committee of Eminent African Jurists on the case of Hissène Habré' (July 2006) para 12; ILC Yearbook 2001, A/CN.4/SER.A/2001/Add.1 (Part 2)/Corr 1 27 [6] of the commentary to art 7; Institute of International Law (13th Commission), 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law: Rapporteur Mr Joe Verhoeven' (2001) arts 12 and 13(2); International Law Association, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences: Report of the 69th Conference held in London, 25-29 July 2000' (London, 2000) 423; Andrea Bianchi, 'Immunity Versus Human Rights: The *Pinochet* Case' (1999) 10 EJIL 237, 259; Adam Day, 'Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got *Belgium v Congo* Wrong' (2004) 22 Berk J Intl L 489, 499; Klingberg (n 46) 522; Cassese (n 29) 864; Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French Cour de Cassation' (2001) 12 EJIL 595, 602-3; Paola Gaeta, 'Official Capacity and Immunities' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 129; Mathias Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v Federal Republic of Germany*' (1994) 16 MichJInt'l L 403, 421-23.

Cases, whereby foreign courts have upheld the plea of functional immunity in respect of international crimes, have only concerned a few States, which are as follows: China, Israel, and the United States. It is possible to view the availability of functional immunity to US officials in foreign courts due to the United States' global influence. As a result, such State practices may not necessarily form the basis of a lasting State practice and may only persist until an agreement over the definition of international crimes is reached and the instances of revoking immunity are made clearer by more consistent State practice. Most cases where the immunity of US officials were upheld were in European States' courts, and concerned officials in a previous US administration, where allegations of torture and war crimes were attributed to the officials concerned.⁵⁰

Other prominent instances include Chinese⁵¹ and Israeli⁵² officials and ex-officials.⁵³ The inconsistent State practice in relation to prosecution on the basis of international crimes against Israeli officials could be explained on the basis that the State of Israel enjoys political support in States which have been pioneers of the prosecution of foreign officials in respect of international crimes. Moreover, this inconsistent State practice could also be explained on the basis that Israel is involved in an ongoing conflict and that other States have not been inclined to initiate proceedings which would essentially last as long as there is instability in the relationship between Israel and its neighbours. Additionally, allowing proceedings in respect of Israeli officials would be equivalent to making a political statement with regard to the conflicts in which Israel is involved. As noted, State practice has not always been consistent in relation to foreign officials and functional immunity has, in certain circumstances, been upheld

⁵⁰ *Center for Constitutional Rights et al v Donald Rumsfeld et al* (Higher Regional Court of Stuttgart) Case No 5 Ws 109/05, Decision of 13 September 2005; *Donald Rumsfeld Case*, (Decision of the Public Prosecutor, Paris Court of Appeal, 28 February 2007) 2007/09216/SGE.

⁵¹ *Fang v Jiang Zemin* (n 25); *Zhang v Jiang Zemin* (n 25).

⁵² *Belhas v Ya'Alon*, 515 F 3d 1279 (DC Cir 2008) [22–23].

⁵³ Joanne Foakes, *Position of Heads of State and Senior Officials in International Law* (OUP 2014) 158.

even in respect of allegations of international crimes.⁵⁴ Granting functional immunity to those accused of committing international crimes could be explained by non-legal considerations.

3.4. Individual Criminal Responsibility

Despite the fact that State practice and other legal authorities support the general idea that functional immunity is not available to officials for international crimes, their doctrinal approach to this idea is not always similar. The approach that functional immunity cannot be used as a shield for officials accused of committing international crimes even if committed in an official capacity is based on the fact that such acts cannot be considered as sovereign acts for which functional immunity is available⁵⁵ (prohibited acts both for the State and individuals). Consequently, this approach generally treats the question of State responsibility separately.

These approaches also generally share the idea that prohibited acts for individuals cannot protect officials for international crimes. For instance, Alebeek submits that acts for which the irrelevance of the official capacity of individuals has developed in international law are exempt from the operation of the rules of functional immunity.⁵⁶ Despite the fact that the development of irrelevance of official capacity (or individual criminal responsibility) may be related to the development of States' responsibility in international law to prevent the crime and prosecute the alleged offenders, there is, nonetheless, a legal distinction between the argument proposed here on the basis of dual responsibility of States and individuals and the argument which only emphasises the prohibition of the act for individuals or officials.

The arguments on the basis of irrelevance of official capacity or individual criminal

⁵⁴ *Fang v Jiang Zemin* (n 25); *Zhang v Jiang Zemin* (n 25); *Belhas v Ya 'Alon* (n 52) [22–3]; *Rumsfeld* (2005) (n 50); *Donald Rumsfeld Case* (n 50); *Bouzari v Bahremani*, 2015 ONCA 275; *Al-Adsani v United Kingdom* (2001) 34 EHHR 11; *Jones v Saudi Arabia* (n 47); ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2008) (n 5)104.

⁵⁵ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) chapter on immunity of officials.

⁵⁶ Alebeek (n 22) 131 and Chapter 3; Rosanne van Alebeek, 'National Court, International Crimes and the Functional Immunity of State Officials' (2012) 59 NILR 5.

responsibility overlook the dimension of the function of rules of functional immunity, which is also to protect foreign States from the right of non-intervention.⁵⁷ This view puts the emphasis on a rule of international law which has recognised the irrelevance of official capacity in relation to an act; thus, the customary status of the crime is ignored. Instead, the attention is shifted to the irrelevance of the official capacity aspect of an act or the concept of individual criminal responsibility in international law. There is a legal difference between the two as far as the creation of a customary rule or an international rule is concerned. The emphasis on individual criminal responsibility has another disadvantage, as it has the potential to limit the unavailability of functional immunity to the “core crimes”, as individual criminal responsibility has mostly been associated with crimes prosecuted by international tribunals and courts.⁵⁸

The absence of functional immunity of officials with respect to international crimes is also justifiable from the perspective of balancing the rights of the States involved. It was argued in Chapter Two that, the prohibition of international crimes is based on the legitimacy of these norms rather than the self-interest of States. International crimes protect interests which have been fully internalised by States. The argument that functional immunity should not be available to officials or ex-officials for the commission of international crimes in effect changes the competing interests of the States involved by adding the interests of the international community into the equation. The assertions made here are in line with those of Parlett, who holds that there is increasing recognition that States’ sovereign interests must yield to the protection of the common interests of the international community; hence, there is hope that the unavailability of functional immunity in respect of international crimes becomes part of

⁵⁷ Douglas (n 9) argues that functional immunity is not available if the act is prohibited only for the individuals.

⁵⁸ See generally Arsanjani’s article on the Rome Statute and ‘core crimes’ Mahnouch H Arsanjani, ‘The Rome Statute of the International Criminal Court’ (1999) 93 *American Journal of International Law* 22; see also Fred Grünfeld Alette Smeulers, *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook*, vol 32 (Brill) 162; Steffen Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v Belgium* Case’ (2002) 13 *European Journal of International Law* 877.

general international law.⁵⁹

Legal authorities that claim international crimes cannot rebut the functional immunity of officials are in the minority,⁶⁰ and generally have a different understanding of the relationship between State immunity and functional immunity. Akande and Shah, for instance, propose that international crimes cannot override the functional immunity of officials on an understanding that assimilates State immunity (*acta jure imperii*) with the functional immunity of officials.⁶¹ The difference between functional immunity and State immunity is considered in detail in Chapter 5 where it is argued that the two immunities cannot be assimilated in this way. The argument here is not that a general rule of customary international law has developed to allow States to withhold functional immunity. Hence, States are/were, nonetheless, allowed to withhold the functional immunity of officials on the basis of the status of these acts as international crimes because of dual responsibility and the fact that these crimes represent the interests of the international community.

4. Functional Immunity and Rules of Attribution

4.1. Rules of Attribution and Distinction between Private and Official Acts

Many legal authorities support the idea that the rules of functional immunity depend on the rules of attribution.⁶² The assimilation of the rule of functional immunity with the rules of attribution inherently invites ambiguity in determining the rules of immunity of officials. For instance, in its commentary on Article 4 of Internationally Wrongful Act of a State, the ILC

⁵⁹ Parlett (n 8) 66.

⁶⁰ Day (n 49) 502 expresses doubt as to whether such a rule has emerged in international law; ILC, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (n 7) 61.

⁶¹ Akande and Shah (n 3) 829.

⁶² *ibid* 827; *Prosecutor v Tihomir Blaskic* (n 49) [38]; *Jones v Saudi Arabia* (n 47) [76–78]; Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 CLR 530, 539–44; Douglas (n 9) 281; Hans Kelsen, *Peace Through Law* (Lawbook Exchange 1944) 81–84; Hans Kelsen, *General Theory of Law and State* (Transaction Publishers 2006) 355; Josef L Kunz, 'Privileges and Immunities of International Organizations' (1947) 41 AJIL 828, 828–38; HF van Panhuys, 'In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities' (1964) 13 ICLQ 1193, 1192–1208.

noted that, when an individual acts in an official capacity or under the authority of a State (as opposed to purely private conduct), the actions in question will be attributable to the State.⁶³ The ILC further observed that cases where ‘officials acted in their [official] capacity, albeit unlawfully or contrary to instructions, must be distinguished from cases *where the conduct is so removed from the scope of their official functions* that it should be assimilated to that of non-officials, not attributable to the State’.⁶⁴

Not only is this a paradox, which goes against the application of the general rule of attribution to determine the operation of functional immunity, this approach also introduces an exception to the general rules, which is so vague that makes it difficult, if not impossible, to make proper inference of the kind of conduct for which officials do not enjoy functional immunity. In this respect, it could be argued that the concepts of attribution of conduct to State and functional immunity are not coterminous; in another words, attribution of conduct to the State does not necessarily determine the availability of functional immunity, and thus functional immunity is distinct from State responsibility.⁶⁵

The application of the rules of attribution would inevitably lead to the recognition of immunity for the commission of most international crimes, which is against the State practice. This is unless one accepts that international crimes are committed in a private capacity. First, it is contended that the operation of the rules of immunity⁶⁶ should be seen in light of the fact that most instances of violations of international crimes occur under the authority of a State or its organs, in charge of swathes of territory and populations. In fact, some international crimes, such as crimes against humanity and genocide, can only be committed by individuals who have

⁶³ A/CN.4/SER.A/2001/Add.1 (Part 2)/Corr 1 (n 49) 40; ILC, ‘Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction’ (n 22) paras 78–87, 111–15.

⁶⁴ A/CN.4/SER.A/2001/Add.1 (Part 2)/Corr 1 (n 49) 46 para. 7, commentary to art 7 (emphasis added).

⁶⁵ Dinstein (n 32) 82–90.

⁶⁶ ‘Par in Parem Non Habet Imperium - Oxford Reference’ <<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100306400>> accessed 1 October 2015.

the resources of a State and exercise authority over a defined territory and population ('systematic and widespread' factors⁶⁷). According to the rules of attribution, an official enjoys immunity unless such acts are categorised as private acts, but, in most cases, the application of the rules of attribution to functional immunity in respect of international crimes will resemble an artificial construction of reality.

Secondly, the recognition of the commission of international crimes as private acts will essentially preclude the possibility of State responsibility. The categorisation of international crimes as private acts⁶⁸ 'by their very nature may be difficult to reconcile with the principle that a State is to be held responsible for crimes under international law committed by its organs'.⁶⁹ Hence, legitimacy and coherency concerns⁷⁰ have persuaded legal authorities to adopt a different interpretation of this principle by categorising international crimes, even if committed under the authority of States, as acts, which do not attract functional immunity. The argument that international crimes, even if committed in an official capacity,⁷¹ do not attract functional immunity is consistent with the fact that most international crimes are precisely committed as part of State policy under the authority of State institutions and high-ranking

⁶⁷ *Arrest Warrant* (n 6) Dissenting Opinion of Judge Wyngaert [36].

⁶⁸ *Pinochet (No 3)* (n 14) Lord Browne-Wilkinson 203-05.

⁶⁹ ILC Yearbook 2001, A/CN.4/SER.A/2001/Add.1 (Part 2)/Corr 1 40; ILC 'Immunity of State Officials from Foreign Criminal Jurisdiction', Memorandum by the Secretariat, (2008) A/CN.4/596 126; Markus Rau, 'After *Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations-The Decision of the European Court of Human Rights in the *Al-Adsani* Case' (2002) 3 German Law Journal 1, 7; Curtis A Bradley and Laurence R Helfer, 'International Law and the US Common Law of Foreign Official Immunity' (2010) 2010 Supreme Court Review 213, 239; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium* Case' (2002) 13 European Journal of International Law 877, 891.

⁷⁰ Koh (n 21) 1151.

⁷¹ White (n 14) 215-223, 222; Danesh Sarooshi, 'The Statute of the International Criminal Court' (1999) 48 ICLQ 387, 392; Michael Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 Duke LJ 651, 658-660; Jill M Sears, 'Confronting the "Culture of Impunity": Immunity of Heads of State from Nuremberg to *Ex Parte Pinochet*' [1999] Germ Yrbk Intl L 126; Andrea Bianchi, 'Denying State Immunity to Violators of Human Rights' (1994) 46 AustrianJPubIntl L 195, 229; *ibid* 227-28; *Arrest Warrant* (n 6) Joint Separate Opinion [58].

officials.⁷²

The ICJ, in *Arrest Warrant*, held that a former foreign minister does not enjoy immunity if the acts in question were committed in a private capacity.⁷³ The ICJ did not explicitly refer to international crimes in the four conditions it suggested with respect to the unavailability of functional immunity. There could be two interpretations regarding the ICJ's position on functional immunity with respect to international crimes. First, the ICJ intended to convey that officials enjoyed immunity in respect of international crimes, unless such crimes were committed in a private capacity, which, as explained above, concern at least some international crimes that cannot by nature be committed in a private capacity or are generally committed in an official capacity (a literal understanding of para 61 of the judgment). Secondly, due to the fact that the ICJ was mainly concerned with the immunity of high-ranking officials (personal immunity) and paid only marginal attention to the functional immunity of officials in the context of the immunity of high-ranking officials, one could assume that the proposed conditions by the ICJ for lifting of immunity are not exhaustive.⁷⁴ Thus, the ICJ's position cannot be interpreted to convey that international crimes can only be committed in a private capacity, or that if an international crime is committed in an official capacity, the official enjoys immunity.

Accordingly, the following factors undermine viewing rules of attribution as a sufficient factor for the determination of rules of functional immunity. First, State practice and many legal authorities have held that functional immunity is not available to officials, even if committed in an official capacity. Secondly, the second interpretation of the ICJ's dicta in

⁷² Jan Wouters, 'The Judgement of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks' (2003) 16 *Leiden Journal of International Law* 253, 263; *Pinochet* (No. 3) (n 14) Lord Goff.

⁷³ *Arrest Warrant* (n 6) [61].

⁷⁴ Akande and Shah (n 3) 839: the list was non-exhaustive and does not preclude the possibility that there is a rule removing immunity *ratione materiae* in relation to prosecutions for acts amounting to international crimes,.

Arrest Warrant illustrates that the list proposed by the ICJ was not exhaustive. Finally, the categorisation of international crimes as private acts will preclude States' responsibility, which undermines the justifiability of relying only on the rules of attribution to determine the functional immunity of officials.

4.2. Rules of Attribution and Dual Responsibility

The application of the rules of attribution to functional immunity rejects the possibility of dual responsibility for the State and its officials. In *Jones v Saudi Arabia*, the House of Lords relied on the rules of attribution to hold that the Saudi official in question enjoyed immunity. This approach was not based on a doctrinal basis relating to the rules of functional immunity per se but, rather, on the misconception that the rules of functional immunity are only dependent on the rules of attribution,⁷⁵ and consequently, the attribution of conduct to the State necessarily implies the existence of immunity.⁷⁶ Despite the fact that the rules of functional immunity partly depend on the differentiation between private and official conduct, and for official conduct, the rules of attribution could be helpful from a practical perspective, this test is not determinative, and the rules of attribution are legally distinct from the rules of functional immunity.

Moreover, in *Jones*, one of the Law Lords contended that,

international law does not require, as a condition of a State's entitlements to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with its instructions or authority ... [and a] State may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.⁷⁷

Consequently, it could be argued that the application of the rules of attribution to

⁷⁵ *Jones v Saudi Arabia* (n 47) [12, 76, 78].

⁷⁶ Finn Seyersted, 'Jurisdiction Over Organs and Officials of States, the Holy See and Intergovernmental Organisations (2)' (1965) 14 ICLQ 493, 493–525.

⁷⁷ *Jones v Saudi Arabia* (n 47) [12].

functional immunity has the potential to assimilate State immunity with functional immunity,⁷⁸ an idea which is rejected in Chapter 5.

The rules of attribution apply in determining whether the conduct of a State amounts to an internationally wrongful act. The ‘rules of attribution make no distinction as to the function underlying the exercise of public powers by the State official or State organ in question’.⁷⁹ Even State immunity does not depend on the attribution of conduct to the State. In this regard, Douglas asserts that rules of State immunity have been developed,

to reconcile a conflict between the right of the forum State to exercise adjudicative competence and the right of the foreign State to exercise sovereign rights without interference from the forum State ... [Further, unlike] the rules of attribution, the law of State immunity is concerned with the function underlying the exercise of public powers because this is essential to the reconciliation of the competing interests of the forum State and the foreign State.⁸⁰

In the commentary of the Draft Articles on State Responsibility, the ILC emphasised that the prosecution of officials ‘certainly does not exhaust the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs’.⁸¹ Moreover, in the preliminary and second report on the Immunity of State Officials from Foreign Criminal Jurisdiction, the ILC asserted that immunity and State responsibility are two different issues.⁸² The ILC asserted that the individual responsibility of officials and States could be concurrent; ie the attribution of

⁷⁸ See generally, Michael Akehurst, ‘Jurisdiction in International Law’ (1972) 46 BYBIL 145; Ingrid B Wuerth, ‘Foreign Official Immunity: Invocation, Purpose, and Exceptions’ (2013) 23 *SwissRIntl & EL* 214.

⁷⁹ Douglas (n 9) 294.

⁸⁰ *ibid.*

⁸¹ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (Nov 1997) Supplement No 10, chp.IV.E.1, A/56/10 114, art 19 and its commentary.

⁸² ILC, ‘Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction’ (n 7) fn 51; ILC, ‘1996 Draft Code of Offenses Against the Peace and Security of Mankind’ (1996) 51 UN GAOR Supp. (No 10) at 14, UN Doc A/CN.4/L.532, corr 1, corr 3: art 4 provides that the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

conduct to the State does not necessarily connote to the existence of immunity of officials.⁸³ Similarly, in *Bosnia v Serbia* the ICJ noted that individual and State responsibility are distinct and may arise simultaneously.⁸⁴ It has been asserted that ‘the difference is that imputability is a *necessary but not sufficient* requirement for the qualification of an act as in law the act of the State’.⁸⁵

4.3. Rules of Attribution and Crimes Committed in the Territory of the Forum State

This claim that rules of attribution are not necessarily determinative of the operation of the rules of functional immunity is also supported by the fact that officials have been held personally accountable for acts committed in the territory of the forum States. The acts for which functional immunity was rebuked were acts conducted in an official capacity. The position taken here is that attribution and functional immunity are not the same and could occur concurrently. In other words, State responsibility and individual responsibility could occur concurrently. While the attribution of conduct to the State is a relevant factor in determining the availability of functional immunity, it cannot be determinative, as it can play no role in balancing the competing interests of the States involved.⁸⁶

While the rule of attribution cannot justify the absence of functional immunity for ordinary crimes committed in the territory of the forum State, the absence of functional immunity can be explained by the breach of the duty of non-intervention in the affairs of the

⁸³ ILC, ‘Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction’ (n 7) fn 51; ILC, ‘1996 Draft Code of Offenses Against the Peace and Security of Mankind’ (n 82): art 4 provides that the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

⁸⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [171–74].

⁸⁵ Alebeek (n 22) 146, 117, emphasis added.

⁸⁶ Dinstein illustrates that the rules of attribution are not applicable in relation to diplomats enjoying functional immunity: rather, functional immunity only covers official functions, Dinstein (n 32) 82–84.

forum State. In other words, if the acts conducted by the official are acts, which the forum or the receiving State has not consented to, the official does not enjoy immunity regardless of the fact that they were conducted in an official or private capacity.⁸⁷ This is especially applicable when the act is committed under the authority of the home State of the officials, but without the consent of the forum State. That is when the act is a criminal offence under the law of the forum State and/or is illegal under international law (eg kidnapping in the territory of the forum State⁸⁸)⁸⁹.

State practice also indicates that, in the absence of the consent of the territorial State to the acts in question, the forum State has no obligation to recognise the functional immunity of the officials.⁹⁰ In *Khurts Bat*⁹¹ the appellant, a former Head of the Office of National Security of Mongolia, was arrested in the UK pursuant to a European arrest warrant in connection with charges in Germany (kidnapping and false imprisonment of a Mongolian national). The appellant challenged the extradition request made by Germany. The English High Court held that the appellant did not enjoy immunity *ratione materiae*.⁹² The Court also noted that ‘there

⁸⁷ ILC, ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ (2008) (n 5) para 163; see also Sanger (n 16) 217; Dinstein (n 32) 88; Foakes (n 53) 161; Alebeek (n 22) 119–24.

⁸⁸ *Khurts Bat v Investigating Judge of the German Federal Court* (High Court) (2011) 147 ILR 633; *R v Lambeth Justices Ex p Yusufu, Also known as: R v Governor of Brixton Prison Ex p Yusufu* [1985] Crim LR 510; Alebeek (n 22) 119–24; Sanger (n 16) 209.

⁸⁹ Sanger (n 16) 219: the assertions here do not concern the actions which were committed during an international armed conflict, where lawful combatants had acted in compliance with international humanitarian law are immune from the local criminal jurisdiction of the State; Robert Y Jennings, ‘The *Caroline* and *McLeod* Cases’ [1938] American Journal of International Law 82; McLeod offences in *Caroline* case could be explained on this basis, Knut Ipsen, ‘Combatants and Non-Combatants’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd rev edn, Oxford University Press 2014) 82: international law has provided that officials engaged in war in the territory of a State should not be prosecuted by the belligerent State solely for their engagement in war as long as they do not violate the laws and customs of war.

⁹⁰ *The Staschynskij Case*, 18 Entscheidungen des Bundesgerichtshof in Strafsachen 87 (Federal Republic of Germany, Bundesgerichtshof, 1962); *Public Prosecutor at the Tribunal of Milan v Adler (Monica Courtney) and others* (First instance judgment) No 12428/09, ILDC 1492 (IT 2010), 1st February 2010, Court of First Instance; *R v Lambeth Justices Ex p Yusufu* (n 88); Foakes (n 53) 163; Alebeek (n 22) 125.

⁹¹ *Khurts Bat v Investigating Judge of the German Federal Court* (n 88) 633–35, 655 and paras. 61–105.

⁹² *ibid.*

is a dearth of cases which have decided that an official acting on behalf of a State is entitled to immunity from criminal prosecution in respect of offences committed in the forum State'.⁹³

In *R v Mafart and Prieur*⁹⁴ two French nationals had participated in sinking a ship called the Rainbow Warrior in Auckland Harbour on the orders of the French government. The New Zealand High Court convicted the two agents of manslaughter. The Court therefore did not consider whether the orders were carried out in the performance of their official functions and functional immunity was not considered.⁹⁵ Further, it asserted that 'the fact that the defendants acted under orders [of the French government] is not a matter upon which I place any great weight'. The defendants were convicted of manslaughter and wilful damage.⁹⁶

Accordingly, when a crime has been committed in the territory of the forum State or a crime has been committed in the territory of a State requesting extradition of the accused, national courts have held that acting under the order or authority of a foreign government is not the only legally determinative factor.⁹⁷ Just as the denial of functional immunity for acts committed in the territory of the forum State cannot strictly be justified on the basis of 'acts committed in an official capacity', the same argument applies to the denial of immunity to officials for the commission of international crimes outside their territory.

4.4. Rules of Attribution with Respect to Civil and Criminal Proceedings

The following arguments support the idea that civil and criminal proceedings should not be differentiated on the basis of the rules of attribution. First, if a State can deny functional immunity to an official on the basis of discerning official from non-official conduct and in consideration of the prohibitive rules of international law, there would be no reason to differentiate between civil and criminal proceedings. Consequently, the assimilation of State

⁹³ *ibid.*

⁹⁴ *R v Mafart and Prieur* (New Zealand, High Court) (1985) 74 ILR 241 241–51.

⁹⁵ *ibid.*

⁹⁶ *Mafart and Prieur* (n 94).

⁹⁷ Sanger (n 16) 218.

responsibility and functional immunity has the potential to lead to incoherent legal outcomes in relation to civil and criminal proceedings.

For instance, in *Pinochet III* it was asserted that had Pinochet been sued in a civil proceeding, he would essentially have enjoyed immunity in respect of the crimes in question, as the acts would have been attributed to Chile. This conclusion was reached by Lord Hutton and Lord Phillips.⁹⁸ The same acts would be treated differently, not on the basis of the differences between criminal and civil proceedings or the nature of the act as a crime in international law; but rather, on the fact that a civil suit against an official may be attributed to the State.⁹⁹ If the test is to distinguish between private and official conduct, then it is not clear why one has to differentiate between civil and criminal proceedings in this way.¹⁰⁰ Moreover, the international responsibility of the State does not distinguish between civil and criminal responsibility and ‘it is a single undifferentiated concept of responsibility’.¹⁰¹

It is also often contended that ‘the foreign State is indirectly impleaded when civil proceedings are brought against one of its officials so that, for instance, the State would be expected to satisfy any judgment of damages awarded against the official’.¹⁰² That said, States have no obligation under international law ‘to indemnify their functionaries in respect of judgments rendered against them by [foreign] national courts’.¹⁰³ Moreover, there is no factual evidence that officials sued in foreign courts have been reimbursed by their home State for the damages awarded.¹⁰⁴

However, if the proceedings are brought on the basis of the same acts, ie international

⁹⁸ *Pinochet (No 3)* (n 14) [264 and 286].

⁹⁹ *Pinochet (No 3)* (n 14) Lord Hutton 264, Lord Phillips 286, Lord Browne-Wilkinson 254; See also, Elizabeth Franey, *Immunity, Individuals and International Law: Which Individuals Are Immune from the Jurisdiction of National Courts Under International Law* (Lap Lambert Academic Publishing 2011) 204.

¹⁰⁰ Sanger (n 16) 201.

¹⁰¹ *ibid.*

¹⁰² Douglas (n 9) 308.

¹⁰³ *ibid.*

¹⁰⁴ *Hilao v Marcos* (n 21).

crimes which create responsibility both for the State and the individual, it is difficult to argue that a State violates its duty of non-intervention in the affairs of the other State by initiating a civil proceeding against a foreign official. Accordingly, from this perspective, neither criminal¹⁰⁵ nor civil proceedings¹⁰⁶ can be conceived of an act which amounts to an infringement of the duty of non-intervention.

Individual liability could arise from international law (ie international crimes) or the domestic law of the forum State. As noted in the previous section, individual liability in the domestic law of the forum State could arise when an official is acting in an official capacity but that the actions in question are in violation of the duty of non-intervention in the affairs of other States (ie conducted without the consent of the forum State). This test does not differentiate between civil and criminal proceedings and is consistent with State practice in relation to crimes committed in the territory of the forum State.

Secondly, State practice in relation to the rules of functional immunity of officials in civil proceedings with respect to international crimes should be seen in light of the rules of jurisdiction. In the case of *Jones*, the House of Lords granted immunity *ratione materiae* to Saudi Arabian officials in a civil suit in respect of allegations of torture.¹⁰⁷ This case was based on the exercise of universal civil jurisdiction *in absentia*, as the defendant was a Saudi official and residing in Saudi Arabia. On this basis, civil proceedings ‘do not depend upon the physical presence of the defendant official and may proceed (particularly where former officials are involved) without the official's home State even being aware of the proceedings’.¹⁰⁸ As noted

¹⁰⁵ Foakes (n 53) 142.

¹⁰⁶ Parlett (n 8) 63; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another (Secretary of State for Constitutional Affairs and Another intervening) Mitchell and Others v Al-Dali and Others* Court of Appeal 28 October 2004 [2004] EWCA Civ 1394 [2005] QB 699 [75–6, 84–86 and 90].

¹⁰⁷ *Jones v Saudi Arabia* (n 47) Lord Hoffman paras. 44 and 71; also see *Al-Adsani v United Kingdom* (n 54); *Al-Adsani v Government of Kuwait and Others* (n 47); *Fang v Jiang Zemin* (n 25); *Zhang v Jiang Zemin* (n 25).

¹⁰⁸ Foakes (n 53) 143.

in Chapter 3, the United States Supreme Court in *Kiobel* held that the requirement of nexus (ie sufficiently “touch and concern”) to the United States was essential to rebut the presumption against the extraterritorial exercise of jurisdiction¹⁰⁹ for cases brought under the Alien Claims Tort Act.

As the chapter on jurisdiction argued, one of the conditions for the exercise of adjudicative universal jurisdiction over international crimes is the presence of the perpetrator on the territory of the forum State. In respect of criminal proceedings, the most important nexus was the presence of the perpetrator in the territory of the forum State. This nexus between the offence or the offender and the forum State in respect of civil proceedings against a foreign official could also translate to the possession of assets and properties in the territory of the forum State or the presence of the offender in the territory of the forum State for the exercise of adjudicative civil universal jurisdiction.

It was also argued that criminal universal jurisdiction must be exercised on a subsidiarity basis. In other words, the foreign State must have failed to prevent the commission of the crime, as well as to prosecute the offenders. In this respect, one could argue that there may be situations in which it would be disproportionate to grant functional immunity in civil proceedings to foreign officials in relation to international crimes; further, one condition to ascertain when considering ‘proportionality is whether there is an effective domestic remedy for the [international crime] within the foreign state’.¹¹⁰

There is also support for this approach in the practice of the United States in relation to the unavailability of immunity *ratione materiae* in civil proceedings for international crimes.¹¹¹

¹⁰⁹ *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct. 1659, 569 US 12, 185 L Ed 2d 671 (2013) 1669.

¹¹⁰ Parlett (n 8) 63; *Jones (CA)* (n 106) [75–6, 84–86 and 90].

¹¹¹ *Xuncax v Gramjo* (n 46): summary execution; disappearance; torture, arbitrary detention; cruel, inhuman and degrading treatment; *Cabiri v Assasie Gyimah* (n 46) (torture); *Doe v Qi*, 349 F Supp 2d 1258 (ND Cal 2004): human rights violations 1287–88; *Hilao v Marcos* (n 21): torture, execution and disappearances; *Samantar v Yousuf*, 130 S Ct. 2278 (2010); Koh (n 21) 1152.

US law and practice suggest that a subsidiarity basis and the nexus between the forum State and the offender or offence could also be applicable in civil proceedings. For example, the United States Torture Victim Act (s2(b)) provides that a ‘court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred’.¹¹² Thus, there is good argument both in theory and in practice (*Kiobel* and the United States Torture Victim Act) for the applicability of the conditions of the exercise of universal jurisdiction to civil proceedings. In this respect, it is not surprising that, due to the artificial difference between civil and criminal proceedings, other States are slowly beginning to award damages to victims of international crimes by foreign officials.¹¹³

It must also be noted that, in other cases, in which States have accepted the pleas of functional immunity of officials,¹¹⁴ the invocation of the defence of immunity would not have arisen had the courts considered the issue of jurisdiction. In all of these cases whereby the plea of functional immunity was upheld, the officials or ex-officials were not even present in the territory of the forum State and that there was not any evidence that these officials had personal properties in the territories of the forum State for the purposes of civil proceedings against them. First, in those cases the upholding of immunity was based on the misconception about the relationship between the rules of immunity and jurisdiction. Secondly, it could be attributed to the belief that international law does not allow universal civil jurisdiction in respect of international crimes. The recognition that civil proceedings also require a nexus to the offence or the offender is important, as in most cases where the civil suits against officials have been

¹¹² Torture Victim Protection Act of 1991, s 2(a), 28 USC s 1350.

¹¹³ The Assize Court in *Prosecutor v Ould Dah* issued two judgments one criminal and one of a civil nature against Mauritanian army officer who was found in France *Ould Dah* (n 46); also see Institute of International Law (1st Commission), ‘Universal Civil Jurisdiction with Regard to Reparation for International Crimes: Rapporteur M. Andreas Bucher’ (30 August 2015), art 5.

¹¹⁴ *Bouzari v Bahremani* (n 54); *Zhang v Jiang Zemin* (n 25); *Fang v Jiang Zemin* (n 25); *Al-Adsani v United Kingdom* (n 54); *Case of Jones and Others v The United Kingdom* (App no 34356/06 and 40528/06) ECHR 14 January 2014; *Jones v Saudi Arabia* (n 47).

rejected, national courts would not have had adjudicative and enforcement jurisdiction. This is supported by the fact that neither the foreign officials were present in the territory of the forum State, nor was there any evidence that they had assets or properties in the territory of the forum State¹¹⁵ or at any point were present in their territories.

Thirdly, allowing civil suits against officials for the commission of international crimes is in line with the interests that these norms protect. If the objective of prosecution of those accused is to uproot such international crimes in the community of States, then civil suits could also dissuade officials from committing such acts and provide damages to the victims (which is at the core of civil suits).¹¹⁶ This is particularly important as the commission of mass violations of human rights generally occurs in failed States and/or States with high levels of financial corruption.¹¹⁷ Civil suits are used for punitive purposes, and there is no sound doctrinal justification for their inapplicability in relation to international crimes.

The arguments here can be summarised as follows. First, functional immunity depends on the differentiation between official and private conduct and is not necessarily dependent on the attribution of conduct to the State. Secondly, State practice in relation to the rules of functional immunity in civil proceedings should be viewed in light of the rules of universal jurisdiction. Thirdly, civil suits have been used as punitive measures and could be effective in fighting impunity, as there is a correlation between corruption and the commission of international crimes. Fourthly, there is evidence in legal authorities that the legal consequences

¹¹⁵ *Al-Adsani v United Kingdom* (n 54); *Jones v Saudi Arabia* (n 47); *Case of Jones and Others v The United Kingdom* (n 114); *Bouzari v Iran*, CanLII 64216 (ONCA 2003); *Bouzari and Others v Iran* (ONCA) (2004) 128 ILR 586; *Kazemi and Hashemi v Iran* (n 25).

¹¹⁶ Kenneth Mann, 'Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law' (1992) 101 YaleLJ 1795, 1795.

¹¹⁷ The most corrupt States are, in order: Somalia, North Korea, Sudan, Afghanistan, Iraq, Turkmenistan, Uzbekistan, Libya, Eritrea, Yemen, Venezuela, Haiti, Guinea-Bissau, Angola, Syria, Burundi, Zimbabwe, Myanmar, Cambodia, Democratic Republic of the Congo and Chad: Transparency International, 'How Corrupt Is Your Country?' <<http://www.transparency.org/cpi2014/infographic>> accessed 30 September 2015; the report indicates that violations of human rights were prevalent (eg torture) in these States: Amnesty International, 'The State of the World's Human Rights', Annual Report 2014/15.

of international crimes should also extend to the civil responsibility of individuals and that victims of international crimes should be compensated. Finally, civil proceedings in relation to international crimes against foreign officials do not amount to interference in the internal affairs of other States more than criminal proceedings (Chapter 3).

5. Conclusion

This chapter also considered that the existence of universal jurisdiction does not automatically lead to the revocation of officials' immunity and that the absence of immunity does not lead to the existence of universal jurisdiction (Section 2). It also argued that the existence of adjudicative and enforcement universal jurisdiction is dependent on the absence of the functional immunity of officials (Section 2). The rules of jurisdiction precede the rules of immunity and for the ascertainment of the rules of jurisdiction the rules of immunity should be considered (Section 2). Both the rules of immunity and jurisdiction seek to achieve a balance between the rights of the States involved (Section 2). Whilst the absence of functional immunity in respect of international crimes is based on dual responsibility of the crimes, the existence of the right of universal jurisdiction was argued to be based on the *erga omnes* character of international crimes (Section 3.1 and Chapter 3, Section 3).

Functional immunity benefits both the State and its officials; thus, if functional immunity is to be rebutted for an act, that act must be prohibited both at the State and individual level (Section 3.1). This chapter also argued that functional immunity is not necessarily dependent on the rules of attribution of State responsibility (Section 4). The rules of attribution cannot give proper weight to the part of the function of the rules of functional immunity which gives protection to officials, as individuals are differentiated from the protection that functional immunity grants to States (Section 4.3). This view is also supported in the legal literature and many of the national decisions are not in line with the assertion that the attribution of conduct to the State entails the availability of functional immunity (Section 4.4). The fact that officials

have been held personally responsible for crimes committed in the territory of the forum State, even if the conduct was attributed to the State when the actions in question amounted to infringement of the duty of non-intervention in the affairs of the forum State, illustrates that the rules of attribution can be determinative in ascertaining functional immunity (Section 4.4).

It was argued that the rules of attribution lead to an artificial distinction between criminal and civil proceedings and that instead the emphasis should be on the act as a crime in international law, rather than the mode of proceedings (Section 4.5). This was justified on the basis that functional immunity depends on discerning official from private conduct, unless an act is prohibited both for the State and individuals, and does not depend on the attribution of conduct to the State (Section 4.5). This chapter also proposed that State practice in relation to the rules of functional immunity in civil proceedings should be viewed in light of the rules of the exercise of universal jurisdiction (Section 4.5).

Chapter Five: Personal Immunity of States and Officials and International Crimes

1. Introduction

Chapter Four argued that functional immunity is not available for international crimes as they create obligations both for States and their officials. As functional immunity is available both for the benefit of the State and its officials, its revocation can be justified if both the State and the official concerned breach their obligations under international law. That said, if the operation of personal immunity is similar to functional immunity, then this will undermine the justification regarding the unavailability of functional immunity for the commission of international crimes (Chapter Four).

The rationale for the absence of functional immunity of foreign officials is not applicable to the personal immunity of officials because the operation of personal immunity of officials is different from the functional immunity of officials under international law (Section 2). A general rule of customary international law has emerged which requires an explicit exception to the rules of personal immunity of officials and States, either in conventional law or customary law (Sections 2 and 3.1)

First, the functional immunity of officials is different from the restrictive immunity of States (Section 2). Functional immunity is discerned by distinguishing official from non-official functions, but State immunity comprises exceptions in international law (*acta jure gestionis*) (Section 2.1). It argues that, for determining the availability of functional immunity, the judicial authorities exercise discretion in discerning official from non-official conduct, whereas in determining State immunity, it is merely the consideration whether the facts of a case fall within one of the accepted exceptions to State immunity (Section 2.2). In other words, it is the recognition of the exceptions to personal immunity in international law which determine the availability of personal immunity of States.

Secondly, the nature of the rules of personal immunity with respect to States and their officials is essentially the same (Section 3.1). In other words, an explicit waiver of (personal) immunity by the home State of official or the existence of an exception is needed to rebut the personal immunity (Section 3.1). This chapter considers the State practice on personal immunity of officials and the rationales behind such immunity. First, personal immunity is granted to high-ranking officials on the basis of the duty of non-intervention, which is expressed as the function theory (Section 3.1). Secondly, the primary beneficiary of immunity *ratione personae* is the State, which is ultimately entitled to waive an official's immunity since personal immunity is based on the status of officials to perform the essential tasks of the State (Section 3.1).

The contention that a rule of customary international law has developed in relation to personal immunity is supported by the fact that the personal immunity of officials is absolute and has only been rebuked if there is an exception (Section 3.1). The development of an exception to rules of the personal immunity of officials in customary law is also considered in light of the establishment of the International Criminal Court (ICC) (Section 3.2). An exception to the rules of personal immunity in respect to crimes under the ICC Statute for crimes committed in the territory of other States is under development in international law (Section 3.2). There are also circumstances in which a State may be able to reject pleas of personal immunity of foreign officials on the basis of the plea of necessity in international law (Section 3.2). Accordingly, a State can, under international law, justify such non-compliance with its international obligations in certain factual circumstances based on the plea of 'necessity' in international law (Section 3.2).

Thirdly, the justifications based on the conflict of norms in relation to international crimes - some which have gained the status of *jus cogens* - and the rules of immunity are not based on sound legal justifications (Section 4). More specifically, the arguments based on the

bifurcation of the rules of immunity to substantive and procedural rules are not sound (Section 4). This is contended on the grounds that the procedural basis of the rules of immunity relates to their function rather than their status in international law (Section 4). The status of rules of immunity in international law is based on their customary law status¹. This section also suggests that substantive/procedural-based arguments cannot properly account for other principles of international law and State practice (Section 4).

2. Functional Immunity and Personal Immunity

This section demonstrates that there is a difference between the functional immunity of officials and the personal immunity of States, both in State practice and in doctrine. If the operation of the rules of personal immunity and functional immunity are indistinguishable, one cannot propose that a rule of customary law has developed in relation to personal immunity that rules of personal immunity can be rebutted only when specific exceptions to personal immunity are recognised under international law.

This section considers whether assimilation of the immunity of States with the immunity of officials is justified by both doctrine and practice. The discussion is based on the fact that State immunity and the immunity of officials are constructed by a similar principle, and that there is some overlap between the two regarding their justifying rationale (ie the duty of non-intervention)². That said there are also some distinctions between personal and functional immunity which need to be taken into account as they affect the operation of these rules.

2.1. *Acta jure imperii and Immunity ratione materiae*

This section considers the link between ‘official conduct’ and *acta jure imperii*. One prominent view assimilates personal immunity with functional immunity by assimilating *acta*

¹ See generally the immunities chapter Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010).

² *ibid* 531–34.

jure imperii/acta jure gestionis differentiation with officials/private acts.³ This approach considers that *acta jure imperii* necessarily give rise to immunity *ratione materiae*.

At least in the judgments of national courts, this could be attributed to the terminology adopted, rather than an actual belief that the functional immunity of officials is similar to the restrictive immunity of States. For instance, in *Holland*,⁴ where the plaintiff was a US citizen teaching at a US military base in the United Kingdom, who was sued for libel,⁵ Lord Hope stated that ‘it is the nature of the act that determines whether it is to be characterised as *jure imperii* or *jure gestionis*’.⁶ Lord Hope further asserted that at first sight writing a memorandum ‘by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university seems far removed from the kind of act that would ordinarily be characterised as something done *jure imperii*’.⁷ Hence, although the terminology adopted seems to suggest that the immunity of States and functional immunity are indistinguishable, the House of Lords reiterated that the fact that the official enjoyed immunity was because the act was performed in an official capacity.⁸

For determining the functional immunity of an official one has to consider whether the acts were conducted in an official capacity and if such acts infringe the prohibitive rules of international law. The prohibition of the act in international law (international crimes) or in the domestic law of the forum State, if the act amounts to a breach of the duty of non-intervention, justify revoking the functional immunity of officials (Chapter Four).

The availability of State immunity invokes a determination of whether the alleged acts

³ *Holland v Lampen-Wolfe* (House of Lords) [2000] 119 ILR 364, 364–65; ILC ‘Immunity of State Officials from Foreign Criminal Jurisdiction’, Memorandum by the Secretariat, (2008) A/CN.4/596 161; *Lozano v Italy* (Appeal Judgment) Case No. 31171/2008, ILDC 1085 (IT 2008); *Holland v Lampen-Wolfe*, Lord Hope 371-72.

⁴ *Holland v Lampen-Wolfe* (n 3).

⁵ *ibid* 365.

⁶ *ibid* 371–72.

⁷ *ibid*.

⁸ *ibid* 365; see also 369, 372, 373, 376, 377-378.

fall within the exceptions; the courts have been rigid in conducting this particular exercise, and reluctant to allow other substantive rules of international law to expand on these.⁹ Indeed, national and international courts have been reluctant to recognise any exception to the rules of State immunity outside the exceptions in the UN Jurisdictional Immunities Convention (UNCJIS), which are widely representative of customary international law.¹⁰ These exceptions mainly relate to personal injury and death or to the economic activities of States, which have a link to the forum State (generally territorial but also including passive and active personality).¹¹ The tort liability under the European Convention is more limited than the UNCJIS, as it excludes the liability of a State's armed forces.¹² The ILC¹³ and ICJ¹⁴ have also noted that the tort exception does not apply to armed conflicts. The ICJ affirmed that this rule was supported by State practice and *opinio juris* of States.¹⁵

National and international courts when discussing the personal immunity of States refer to the fact that State immunity is procedural by nature; however, they concomitantly note that no exception to State immunity has emerged in international law for the commission of

⁹ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99.

¹⁰ *Siderman de Blake v Argentina*, 965 F2d 699 (9th Cir 1992) 103 ILR 455; *Al-Adsani v Kuwait* (QB, 3 May 1995) 103 ILR 420; *Al-Adsani v Government of Kuwait and Others* (1996) 107 ILR 536; *Al-Adsani v United Kingdom* (2001) 34 EHHR 11 [55]; *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another (Secretary of State for Constitutional Affairs and Another Intervening)* (House of Lords) (2006) 129 ILR 630; *Case of Jones and Others v The United Kingdom* (App no 34356/06 and 40528/06) ECHR 14 January 2014 [79]; *Jurisdictional Immunities of the State* (n 9) [59–77 and 84]; *Margellos and Others v Federal Republic of Germany* (Greece, Special Supreme Court) (2002) 129 ILR 525526-33; *Bouzari and Others v Iran* (ONCA) (2004) 128 ILR 586 586.

¹¹ *Letelier v Republic of Chile*, 488 F Supp 665 (DC 1980) 63 ILR 378, 378-79; *Liu v Republic of China* 892 F 2d 1419 (9th Cir 1989) 110 ILR 520; *Bouzari and Others v Iran* (n 10) [45-47].

¹² European Convention on State Immunity of 16 May 1972 (European Treaties, N 74) (opened for signature on 16/5/1972, entered into force on 11/6/1976) arts 11 and 31; *Margellos v Germany* (n 10)533; *Jurisdictional Immunities of the State* (n 9) [62-3 and 67]; *McElhinney v Ireland* (ECtHR) (2001) 123 ILR 73 [38].

¹³ ILC Yearbook 1991, A/CN.4/SER.A/1991/Add.1 (Part I) 45 [10]: the ILC has noted that the art 12 of the UNCJIS does not apply to 'situations involving armed conflicts'.

¹⁴ *Jurisdictional Immunities of the State* (n 9) [62–64].

¹⁵ *ibid* 77.

international crimes (Section 4)¹⁶. This reasoning conveys that, unless an explicit exception exists, personal immunities will be upheld. Considering this strict approach by national and international courts, it becomes apparent the procedural notion to which legal authorities refer has been mainly used to denote the way these norms *interact* with other norms of international law. The reference to the procedural nature of personal immunity conveys an implicit acknowledgement that personal immunities are upheld unless there is an explicit exception in international law, rather than it being strictly their “procedural nature” which conveys their function (Section 4).

Moreover, there are also examples of State practice which have first differentiated between *acta jure imperii/gestionis* and official acts on the basis that there needs to be a recognised exception to State immunity and which have also held that illegal acts in international law remove the cloak of functional immunity but not the personal immunity of States.

In *Khurts*, the English High Court held that the defendant, a Mongolian official, did not enjoy *ratione materiae* in respect of crimes committed in Germany for kidnapping and false imprisonment.¹⁷ The High Court differentiated this from State immunity, holding that the prohibition of torture in international law did not enable the United Kingdom to assert jurisdiction since there was no accepted exception to State immunity from civil jurisdiction.¹⁸ Additionally, Lord Hutton in *Pinochet III* stated that, ‘under international law Chile is responsible for acts of torture carried out by Pinochet, but Chile could claim State immunity if sued for damages for such acts in a court in the United Kingdom’.¹⁹ Moreover, on the basis of

¹⁶ *Bouzari and Others v Iran* (n 10) [18–37]; *Al-Adsani v United Kingdom* (n 10) [52–6]; *Kalogeropoulos and Others v Greece and Germany* (ECtHR, 2002) 120 ILR 537.

¹⁷ *Khurts Bat v Investigating Judge of the German Federal Court* (High Court) (2011) 147 ILR 633.

¹⁸ *ibid* [72].

¹⁹ *Regina v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* (House of Lords) (24 March 1999) [2000] 1 AC 147, 119 ILR 136 Lord Hutton 264; Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1 Peace (9th edn, Longman 1992) 545.

the findings in Chapter Four, it could be argued that General Pinochet would not have enjoyed functional immunity in a civil proceeding either.

Similarly, in *Hilao v Marcos*,²⁰ the relatives of alleged victims of torture, summary execution and enforced disappearance, claimed damages against the former President of the Philippines, his daughter, and the former head of military intelligence in the Philippines. The US Court of Appeals differentiated this case from *Siderman v Blake*.²¹ In *Siderman* the Court of Appeals held that, while the official acts of torture were in violation of international law, they, nevertheless, attracted State immunity.²² The US Court of Appeals in *Hilao* stated that the proceedings in *Siderman* were brought against the State itself, which was clearly within the ambit of the Foreign Sovereign Immunities Act (ie it had to be considered within the enumerated exceptions in the Act), whereas in the present case, the proceedings were against an individual official who was accused of performing acts outside the scope of his authority.²³

The US Court of Appeals held that the acts complained of were clearly outside the authority of the President and had no official mandate.²⁴ In this respect, ‘an examination of the law of State immunity shows that any restrictive rule of State immunity, although based in principle on the distinction between sovereign and private acts, is the subject of limited enumerated exceptions’.²⁵ In line with the approach of the Court, it would ‘difficult to argue that a general rule exists for distinguishing between sovereign and private acts without reference to particularised exceptions, and no human rights exception has gained broad support’.²⁶

²⁰ *In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v Estate of Marcos*, 25 F 3d 1467 (9th Cir 1994) 104 ILR 120.

²¹ *ibid* 122–25.

²² *Siderman v Argentina* (n 10): did not fall within the exceptions of FSIA, however, State immunity was not granted to Argentina on a different legal basis (ie waiver of immunity).

²³ *Hilao v Marcos* (n 20).

²⁴ *ibid*.

²⁵ Kate Parlett, ‘Immunity in Civil Proceedings for Torture: The Emerging Exception’ [2006] EHRLR 49, 65.

²⁶ *ibid*.

The distinction between functional and State immunity is also supported in national judgments. In *Bouzari v Iran*, the appellant initiated a proceeding in Canada against Iran for damages for charges, including kidnapping and torture amongst others.²⁷ The reasoning of the Court of Appeal illustrated that, for determining the existence of State immunity (ie *acta jure imperii*), courts seek to identify whether any specific exception with regard to the immunity of States exists and the examination is not based on categorising the conduct as official or private conduct.²⁸

Two judgments of the European Court of Human Rights (ECtHR) in *Al Adsani* and *Jones* confirm the distinction made above between exceptions to personal immunity and the application of functional immunity of officials. The Court in *Jones* referred to State immunity as a procedural bar²⁹ and the community of nations should accept any limitation to the doctrine of State immunity.³⁰ In fact, the Court in *Al Adsani* explicitly distinguished the immunity of officials from the immunity of States and reiterated that the immunity *ratione materiae* of officials did not affect the immunity *ratione personae* of foreign States in respect of torture.³¹

However, Orakhelashvili criticised the decision of the ECtHR in *Al-Adsani*, contending that the court did not make the distinction between sovereign and non-sovereign acts in upholding the immunity of Kuwait.³² Further, he takes issue with the fact that the ECtHR

²⁷ *Bouzari v Iran*, CanLII 64216 (ONCA 2003); *Bouzari and Others v Iran* (n 10).

²⁸ *Bouzari and Others v Iran* (n 10) [18–37] the Court of Appeal merely relied on the 1985 Sovereign Immunities Act to ascertain whether the State enjoyed immunity.

²⁹ *Al-Adsani v United Kingdom* (n 10) [52–6]; *Kalogeropoulou v Greece and Germany* (n 16); also see *Case of Jones and Others v The United Kingdom* (n 10) [191–205]: the Court differentiated between State immunity and the functional immunity of officials but reached the conclusion that functional immunity was available to officials in civil proceedings.

³⁰ *Case of Jones and Others v The United Kingdom* (n 10) [52–6].

³¹ UN Convention on Jurisdictional Immunities of States and Their Property (2 December 2004) A/RES/59/38 2004 art 3(2); *Arrest Warrant of 11 April 2000 (Congo v Belgium)* [2002] ICJ Rep 3 [51,53,57]; *Affaire Kadhafi* (France, Court of Cassation) (13 March 2001) Judgment No 1414, 125 ILR 490 [508–10]; *Pinochet (No 3)* (n 19) 509, 592, 642, 651 (Lords Millet, Hutton and Saville); *Tatchell v Mugabe* [2004] 53 ICLQ 769, 769–70; ILC, ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ (2008) (n 3), at 61 fn 238; *Devi v Rajapaksa*, No 11 Civ 6634, 2012 WL 3866495 (SDNY 2012) 3; *Arrest Warrant* [55].

³² Alexander Orakhelashvili, ‘State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights’ (2002) 15 LJIL 703, 707.

recognised that the existence of a general rule of State immunity in international law, which is only subject to specific exceptions rather than consideration based on the official or non-official capacity in which the act was committed.³³

Orakhelashvili's criticism is rooted in the belief that under international law there is not a generally recognised legal principle on State immunity which is supported by customary international law.³⁴ It must be mentioned that such a proposition is not necessarily correct. In spite of the fact that there may be differences in the practice of States regarding the exceptions to State immunity, it does not follow that "some" exceptions to State immunity have not crystallised in customary international law. In other words, the recognised exceptions to State immunity represent the exceptions acknowledged by almost all States or the majority of States. Thus, in a sense, one could argue that there is consensus around the accepted exceptions (Chapter Two). Moreover, it is the way that the rules of State immunity are understood that is crucial here. Whether such a specific exception has been recognised or not,³⁵ or is in the process of development, is another matter.

In line with the contention made here, Alebeek dismisses the views that assimilate the functional immunity of officials with State immunity (*acta jure imperii*)³⁶ and proposes that the 'act of State' in functional immunity is an 'autonomous concept unrelated to the concept of the sovereign act of State that controls the rule of State immunity'.³⁷ Sanger also questions the assimilation of State immunity with functional immunity and argues that if the rationale for immunity (*ratione materiae*) is that acts performed by State organs or officials in an official capacity are acts of the State, why is it necessary to distinguish between *acta jure imperii* and

³³ *ibid.*

³⁴ *ibid* 710.

³⁵ For instance, only the US and Canada recognise a terrorism exception to State immunity.

³⁶ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 2 and Chapter Three.

³⁷ *ibid* 7: reformulates the rules of state immunity, functional immunity and personal immunity of officials respectively as lack of special competence, absence of personal responsibility and immunity from jurisdiction.

acta jure gestionis?³⁸ This criticism illustrates the inconsistency of the approach which assimilates the two immunities. In other words, discerning the immunity of officials cannot be based on two tests: it is either the same as the immunity of States (ie determined by the exception to State immunity – *acta jure gestionis* or it is determined by the distinction of official from non-official conduct. It is the exception to State immunity as *acta jure gestionis* that adumbrates the rules of State immunity and not the distinction between official and non-official conduct.

Parlett notes that an exception to State immunity in respect of international crimes which are also *jus cogens* can be achieved by developing a discrete *exception* to State immunity for violations of *jus cogens* human rights.³⁹ The underlying reason why State immunity for international crimes has not been developed when compared to the individual responsibility of international crimes may have to do with State sovereignty. The difficulties which may arise include ‘defining appropriate remedies, and the establishment of necessary institutional procedures and safeguards’.⁴⁰ Institutional issues ‘concern the availability of competent organs to determine whether or not a State is guilty of an international crime and the existence of credible enforcement procedures’.⁴¹

There is, nonetheless, the possibility that an exception to the personal immunity of States and their officials for international crimes may be developed in international law (Section 3.2). For instance, a terrorism exception to the personal immunity of officials may emerge (as discussed earlier). In relation to the personal immunity of States, whilst traditionally exceptions to State immunity have been limited to the actions of States committed in the territory of the forum State, there are indications that an exception to State immunity may be

³⁸ Andrew Sanger, ‘Immunity of State Officials from the Criminal Jurisdiction of a Foreign State’ (2013) 62 ICLQ 193, 212.

³⁹ Parlett (n 25) 66, emphasis added.

⁴⁰ Theodor Meron, ‘Is International Law Moving Towards Criminalization?’ (1998) 9 EJIL 18; Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2012) 265.

⁴¹ Meron, *The Humanization of International Law* (n 40) 267.

emerging for acts committed abroad. For instance, victims of terrorism (an act of torture, extrajudicial killing, aircraft sabotage, hostage taking) and torture can initiate proceedings in the US against foreign States.⁴² Similarly, in Canada, victims can sue foreign States for terrorist acts committed abroad.⁴³ In both cases, exceptions to immunity are applicable only if the State concerned has been nominated by the governments of the US⁴⁴ and Canada⁴⁵ respectively as the State sponsor of terrorism.

2.2. Exercise of Discretion in Ascertaining Functional Immunity

In ascertaining whether an official enjoys functional immunity, national courts exercise discretion to determine whether an act is exercised as part of the official function of the defendant or is a private act. That discretion does not apply to the personal immunity of States. In the case of immunity of States national courts consider whether the facts of a case fall within one of the accepted exceptions to State immunity.

In *Boyer*,⁴⁶ the plaintiff brought an action for libel against the Consul of Panama. The Consul-General had written a defamatory letter (about the plaintiffs) which was published in a newspaper in Panama.⁴⁷ The Civil Court of Marseille held that the wording of the letter showed that the defendant intended to act in the exercise of his functions as Consul-General.⁴⁸ Functional immunity was granted to the defendant since those actions were considered to be part of the official functions of the Consul. In this case, the official was acting in an official capacity yet the State also would have enjoyed immunity as it was not an official activity for

⁴² 28 USC 1605a - Terrorism Exception to the Jurisdictional Immunity of a Foreign State a (2)(ii)(I)-(III).

⁴³ Canada: Justice for Victims of Terrorism Act SC 2012, c 1, s 2 Assented to 2012-03-13 ss 4(1) and 4(2) 'if the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident'; Canada: Criminal Code RSC, 1985, c C-46 pt II (1) s 83.01 defines terrorism which includes all of the terrorism conventions.

⁴⁴ 28 USC 1605a (n 42) s 2(A)(i).

⁴⁵ Canada: State Immunity Act (RSC, 1985, c S-18) s 6(1).

⁴⁶ *Boyer and Another v Aldrete* (France, Tribunal Civil de Marseille) (1956) 23 ILR 445, 445-47.

⁴⁷ *ibid.*

⁴⁸ *ibid* 446.

which a State immunity exception had been established.

In *Bigelow*,⁴⁹ a US consul was sued for libel because he informed the press that the visa application of the plaintiff was rejected on the basis that the applicant was considered to be a spy. The French Court of Appeal stated that the ‘remarks made after the refusal of a visa of the passport of Zizanoff, appear quite materially distinct from the administrative act’ and that ‘the comments released to the press were not necessary to or indispensable to his official functions’.⁵⁰ The Court further stated that the comments were a serious wrong susceptible of injuring private interests and had a personal character which was unconnected with the performance of the official duties of the defendant.⁵¹ The acts were thus considered to be of a private nature.

These two examples illustrate that courts exercise discretion when making a distinction between official and non-official acts in order to determine the functional immunity of officials. There are some similarities between the two cases. In both cases, the officials concerned came across the information as a result of their official functions, disseminated the information to the media, and could not have done so if it not had been for their official positions. They were not actions of a purely private nature, for instance, as one related to a dispute regarding a commercial contract in which the official was a party in his individual capacity. Accordingly, the proper defendant in *Bigelow* should also have been the State had it not been for the discretion exercised by the court to discern official from non-official conduct. Thus, functional immunity is not as straightforward as determining whether the facts of a particular case fall within one of the enumerated exceptions to State immunity.

2.3. UN Jurisdictional Immunities Convention

The analysis of the UNCJIS is also necessary as the Convention might lend force to the

⁴⁹ *Bigelow v Princess Zizanoff* (Court of Appeal of Paris) 23 AJIL 172, 172–79.

⁵⁰ *ibid* 177.

⁵¹ *ibid* 179.

idea that the immunity of States and the functional immunity of officials are indistinguishable. First, the UNCJIS makes the exceptions to State immunity applicable to officials. ‘State representative’ in the Convention is defined as a representative of the State acting in the capacity of a representative of the State.⁵² It also covers additional entities and agents of the State when they are performing acts in the exercise of the sovereign authority of the State.⁵³ Accordingly, an official does not enjoy immunity in respect of certain acts considered as *acta jure gestionis* in civil proceedings.

In *Samantar v Yousef*, the US Supreme Court held that the Foreign Sovereign Immunities Act (which is similar to the provisions of the UNCJIS) covers the immunity of officials only in certain circumstances.⁵⁴ The Supreme Court held that the Act applies only where the term ‘official’ has been specifically used in the Act (eg acts causing injury or death), but the official concerned may still enjoy functional immunity in common law.⁵⁵ The Supreme Court specifically held that term ‘organs of the State’ does not refer to individuals.⁵⁶

Moreover, the fact that the Convention is not yet in force does not add to the obligatory status of the provisions of this convention among those signatory States which are not part of customary international law. This is specifically relevant to the provisions relating to the representatives of States, in light of the fact that there is considerable State practice differentiating between the official acts of officials and *acta jure imperii*. The exceptions which are generally believed to represent customary international law are those relating to State immunity⁵⁷ rather than the functional immunity of officials.

Secondly, the exceptions in the Convention cannot cover questions of an official’s

⁵² UNCJIS (n 31) art 2 (1)(b)(vi).

⁵³ *ibid* art 2(1)(b)(iii).

⁵⁴ *Samantar v Yousuf*, 130 S Ct. 2278 (2010) [571].

⁵⁵ *ibid*.

⁵⁶ *ibid* [569].

⁵⁷ *Jones v Saudi Arabia* (n 10) [26] Lord Bingham; David P Stewart, ‘The UN Convention on Jurisdictional Immunities of States and Their Property’ (2005) 99 AJIL 194.

immunity in civil proceedings, whether acting in a private or official capacity, against officials, which are not included within the exception in the Convention. The Convention applies to the economic activities of States, with the exception of Article 12, which relates to personal injuries and damage to properties. The acts which an official could commit in a private capacity for which the official does not enjoy immunity are limited to the exceptions which also apply to State immunity.

Accordingly, the provision on State representatives can be interpreted as creating an explicit exception for acts, even those committed in an official capacity between signatory States, rather than assimilating the immunities of States and officials. These exceptions do not necessarily reflect the customary status of the rules of functional immunity. For instance, the ILC in its Second Report on Immunity of Officials suggested that an official performing an act of a commercial nature, if performed in an official capacity, enjoys immunity from foreign jurisdiction, but that the State itself, in respect of such an act, does not.⁵⁸

Foakes argues that the notion that functional immunity can apply to an official even when the State itself is not immune is ‘at odds with the orthodox theory that it is merely an aspect of the immunity of the State itself and exists to benefit the State, not the individual’.⁵⁹ While the assertion that immunity is primarily owed to the State is correct, as proposed in Chapter Four, the operation of functional immunity is also to protect officials from actions carried out in the performance of their duties. It was further noted that national courts consider the functional immunity of officials even if the State does not intervene in the proceedings.

Thirdly, the Convention explicitly provides that it does not cover criminal proceedings

⁵⁸ ILC, ‘Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction: by Special Rapporteur Roman Anatolevich Kolodkin’ (10 June 2010) A/CN.4/631 para 28; ILC, ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ (2008) (n 3) para 161.

⁵⁹ Joanne Foakes, *Position of Heads of State and Senior Officials in International Law* (OUP 2014) 141.

which can only relate to officials and specifically officials enjoying functional immunity.⁶⁰ The UNCJIS covers acts of a foreign official which lead to bodily injury or death in the territory of the forum/receiving State. While the official does not enjoy immunity in a civil proceeding; the home State of the official is also responsible and does not enjoy immunity. The official may not enjoy criminal immunity from jurisdiction when the act is committed in the territory of the forum State if it is considered to be in breach of the duty of non-intervention in the affairs of the forum State (eg assassination or kidnapping).

However, the official will enjoy criminal immunity if these conditions are not met. The approach, which assimilates functional immunity with that of State immunity, creates discrepancies between the functional immunity of officials in civil and criminal proceedings. In other words, the official may enjoy immunity in a criminal proceeding unless the act is considered as a breach of the duty of non-intervention, but loses his or her immunity in a civil proceeding in relation to the same act. The provision of the Convention can be interpreted to create an exception to the functional immunity of officials in civil proceedings rather than assimilating functional immunity with State immunity.

As a result, the fact that there is some overlap between the functional immunity and State immunity in terms of the scope of acts covered does not justify assimilating the two. First, the purpose behind State immunity is the sole protection of the rights of the State. Secondly, the existence of the overlap between State immunity and functional immunity does not necessarily mean that they have arisen from the same rationale in international law. Rather, this overlap can arise by specific rules which control the operation of State immunity and functional immunity for certain acts. Functional immunity is based on discerning official from non-official functions, and State immunity is based on ascertaining whether the particular facts

⁶⁰ UNCJIS (n 31), Preamble, art 2 and see art 3(2), which provides that that the provisions of the Convention are without prejudice to personal immunities enjoyed by heads of State.

of a case fall within an already accepted exception to State immunity in international law. States can create exceptions to the rule which otherwise controls the operation of functional immunity under international law.

Moreover, State practice suggests that the test for determining functional immunity in civil proceedings as in criminal proceedings does not depend on the distinction between *acta jure imperii* and *acta jure gestionis*. When considering the immunity of officials enjoying functional immunity, national courts draw comparisons between the immunity of diplomats (Article 39 of the VCDR)⁶¹ and the functional immunity of officials. There are suggestions that State immunity is also distinct from diplomatic immunity.⁶²

The US Court of Appeals in *Swarna*, in relation to Article 39 of the VCDR, stated that ‘immunity applies to acts performed by such a person in the exercise of his functions ... and it does not apply to actions that pertained to his household or personal life and that may provide at best an indirect rather than a ... direct benefit to the diplomatic function’.⁶³ The plaintiff in *Swarna* had alleged trafficking, involuntary servitude, forced labour, assault and sexual abuse and the Court held that the defendant’s employment and treatment of the plaintiff did not constitute official acts.⁶⁴ It was thus held that the plaintiff was employed to meet private needs and not for any mission-related functions.⁶⁵

In a similar factual case, *Baonan*, which again involved a house servant employed by a former diplomat and the housewife of a diplomat,⁶⁶ the Court held that the claimant did not

⁶¹ *Pinochet (No 3)* (n 19) Lord Browne-Wilkinson 152-157 and 202-203, Lord Hope 192-202, and Lord Saville 219-22: maintained that if s 20 of the State Immunity Act is read together with art 39(2) of the Vienna Convention on Diplomatic Relations then the effect would be that a former head of State is entitled to immunity in respect of acts which he had performed in the exercise of his functions as a head of State.

⁶² *ibid* 173, Alun Jones QC, Christopher Greenwood, James Lewis and Campaspe Lloyd-Jacob for the appellants.

⁶³ *Swarna v Al-Wadi, Al-Shaitan and State of Kuwait* (US Court of Appeals, Second Circuit) (2010) 152 ILR 617, 629.

⁶⁴ *ibid* 619 and 632–35.

⁶⁵ *ibid*.

⁶⁶ *Baonan v Baja and Others* (Southern District of New York) (2009) 152 ILR 596, 597.

enjoy immunity regarding human trafficking and forced labour as they were private rather than official acts.⁶⁷ Accordingly, these cases suggest that the test in civil proceedings for determining functional immunity is the same as in criminal proceedings and does not depend on the distinction between *acta jure imperii* and *acta jure gestionis*.

Furthermore, it was proposed that functional immunity should not be available to officials if the action is prohibited, both for the individuals and the State, when the action that is committed in the territory of the forum State amounts to a breach of the duty of non-intervention. The exercise of authority in the territory of another State through agents of a State without the permission of the forum State is deemed as a breach of the duty of non-intervention in the affairs of the forum State. It should also be noted that acts which are not contrary to the law of the forum State that are conducted without the permission of the forum State are not deemed as a breach of the duty of non-intervention. Thus, even for crimes committed in the territory of the forum State, there is an obligation for both the State (duty of non-intervention) and the official (adhering to the laws of the forum State).

The development of exceptions to the rules of State immunity may have contributed towards a misunderstanding of the relationship between the immunity of States and their officials. The contention that State immunity and the immunity of officials are distinct is supported, first, by State practice and other legal authorities, including remarks made by the ECtHR. Secondly, it must be noted that discerning official/non-official conduct inherently involves a discretion which is not applicable in relation to determining State immunity, which is only dependent on discovering whether the particular acts of a case fall within a recognised exception to State immunity. Thirdly, the reference to State representatives in the UNCJIS should not be read to give support to the idea of assimilating the personal immunity of States and the functional immunity of officials. Finally, functional immunity is for the benefit of both

⁶⁷ *ibid* 597 and 604–614.

the States and officials and the absence of State immunity does not necessarily follow the absence of immunity of officials.

3. *Personal Immunity of Officials*

3.1. *Personal Immunity of Officials and International Crimes*

Today it is widely accepted that the immunity of State officials in international law is based on a combination of representative theory⁶⁸, function theory,⁶⁹ and the principle of non-intervention.⁷⁰ Watts asserts that, while the earlier conception of immunity for heads of States made no distinction between the State and heads of State,⁷² today the immunity of a head of State is not coterminous with that of States.⁷³ The purpose behind the personal immunity of States could best be explained as a tool for maintaining international relations by obligating States to respect the duty of non-intervention and abstain from undue interference in the affairs of other States,⁷⁴ thereby allowing officials to perform their duties⁷⁵ and maintain cooperation and peace through the participation of their representatives in inter-State affairs.⁷⁶

It has been contended elsewhere that the State is the primary beneficiary for immunities

⁶⁸ Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French Cour de Cassation' (2001) 12 EJIL 595, 599.

⁶⁹ Huikang Huang, 'On Immunity of State Officials from Foreign Criminal Jurisdiction' (2014) 13 Chinese JIL 1, 2.

⁷⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [202] 'is a corollary of the principle of sovereignty equality of State'.

⁷¹ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 815, 824; Alebeek (n 36) 6, 106 and Chapter Two; *Arrest Warrant* (n 31) [75] Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; Zappalà (n 68) 599; Cryer and others (n 1) 537; *Military and Paramilitary Activities in and Against Nicaragua* (n 70) [202]: 'is a corollary of the principle of sovereignty equality of State'.

⁷² Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* (Brill Nijhoff 1994) 35.

⁷³ *ibid* 36.

⁷⁴ *Pinochet (No 3)* (n 19) Lord Millet (269).

⁷⁵ *Arrest Warrant* (n 31) [54].

⁷⁶ *United States Diplomatic and Consular Staff in Iran* (Merits) [1980] ICJ Rep 3 [91]; *Arrest Warrant* (n 31) [71]; *ibid* [5] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v Belgium* Case' (2002) 13 EJIL 877, 889.

ratione materiae and *ratione personae* and that ultimately the State is entitled to waive an official's immunity, whether this is immunity *ratione personae* or immunity *ratione materiae*.⁷⁷ This view was rejected in relation to functional immunity as it was argued in Chapter Four that the purpose of functional immunity is both to protect the officials as individuals and the State from the duty of non-intervention. As personal immunity is granted to an official because of the office that the individual holds to perform a State's most essential tasks, it can be revoked by the State concerned. The reasoning (ie whether the act is committed in an official capacity or not), which justifies the abrogation of immunity *ratione materiae* in respect of international crimes, is not applicable to the immunity *ratione personae* of officials, which is inherently attached to their status rather than their acts.⁷⁸

It is argued that the nature of the rules of personal immunity with respect to States and their officials is essentially the same. In other words, an explicit waiver of (personal) immunity by the home State of the official, or the existence of an exception, is needed to rebut the personal immunity which is justifiable on the basis of State practice and the rationales of personal immunity.⁷⁹ Immunity *ratione personae* from foreign criminal jurisdiction covers all acts carried out by the official concerned during the period in office, both in his official or

⁷⁷ ILC, 'Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction: By Special Rapporteur Roman Anatolevich Kolodkin' (29 May 2008) A/CN.4/601 para 102; Wirth (n 76) 882.

⁷⁸ Cryer and others (n 1) 538: that solution is not transposable to personal immunity, because such immunity is not based on any authorisation of the act, but rather the need to enable international discourse by precluding any pretext to interfere with high representatives; see also ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2008) (n 3) 109: these assertions depend on the forum State's recognition of the government or the foreign State; *Kadic v Karadzic*, 70 F 3d 232 (2d Cir 1995) 104 ILR 136: recognition of governments and States is generally the task of the executive branch of the government, which issues recommendations on the status of a government or State to its courts.

⁷⁹ *Arrest Warrant* (n 31) [54–58]; Argentina: ICC Implementation Statute 2007 art 27 for exceptions; Australia: Foreign States Immunities Act of 1985, Act No 196 art 36; State Immunity Act of 1978, c 33 art 20; Belgium: Act of 23 April 2003 on the Act concerning Punishment for Grave Breaches of International Humanitarian Law (reproduced in International Legal Materials, vol 42 (2003) pp 1258-1283 art 13.

private capacity, and includes conduct preceding his term of office.⁸⁰ State practice has not contradicted the personal immunities enjoyed by high-ranking officials;⁸¹ in fact, there is a strong claim that there is consensus among States that high-ranking officials enjoy absolute immunity.⁸² However, the exercise of prescriptive and adjudicative jurisdiction (at the initial stages of proceedings, not including the trial) does not infringe the personal immunity of high-ranking officials (eg investigations).⁸³

3.2. Development of Exceptions to Personal Immunity

In conventional law the *explicit* exceptions to personal immunity enjoyed by heads of States and other high-ranking officials appear within the treaty establishing the ICC. Whilst subsection (1) of Article 27 (ie official capacity cannot exempt a person from criminal responsibility entailing the unavailability of functional immunity⁸⁴) finds numerous precedents in international law,⁸⁵ subsection (2) of Article 27 which revokes personal immunities enjoyed

⁸⁰ ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2008) (n 3) 61 fn 238; *Audiencia Nacional, Auto del Juzgado Central de Instrucción No 4* (2008) p 157; *Arrest Warrant* (n 31) [55].

⁸¹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 [170]; *Arrest Warrant* (n 31) [51]; Christopher L Blakesley, 'Extraterritorial Jurisdiction' in M Cherif Bassiouni (ed), *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*, vol 2 (Brill 2008) 170.

⁸² ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2008) (n 3).

⁸³ *Certain Questions of Mutual Assistance in Criminal Matters* (n 81) [17–71]; ILC, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (n 58) paras 42–43.

⁸⁴ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 447–48.

⁸⁵ UNGA, Rome Statute of the International Criminal Court, 17 July 1998 (last amended 2010) art 27; Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement') (8 August 1945) art 7: irrelevance of official position clauses had been embodied in the statutes of IMT, IMTFE, ICTY and ICTR; Charter of the International Military Tribunal for the Far East (19 January 1946) art 6; UNSC, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) 25 May 1993 art 7(2); UNSC, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006) art 6(2); UNGA Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1949) 78 UNTS 277 art 4; ILC '1954 Draft Code of Offences against the Peace and Security of Mankind, Yearbook of the International Law Commission' (1954) 51 UN GAOR Supp. (No 10) at 14, UN Doc A/CN.4/L.532, corr 1, corr3 art 3; Iraq: Statute of the Special Tribunal for Human Rights, 10 December 2003 art 15(c); Law on the Establishment of the Extraordinary Chambers, with Inclusion of Amendments as Promulgated on 27 October 2004 (NS/RKM/1004/006) art 29.

by high-ranking officials in customary international ‘is without precedent in international criminal law instruments’.⁸⁶

It could be argued that, just as absolute State immunity morphed into a restrictive immunity by recognising exceptions to State immunity, there is the possibility that exceptions to the personal immunity of officials might arise in international law. Doctrines about international law and concepts of international law, such as the duty of non-intervention, are determined through the process of socialisation;⁸⁷ thus, their contents are subject to be influenced by new norms and shared understandings. In this context, the establishment of a permanent international criminal court sheds light on the way in which the shared understanding of States on the personal immunities of officials may undergo modifications to include an exception to customary rules on the personal immunities of officials; specifically, with respect to officials who have committed crimes under the ICC Statute in the territory of other States.

States Parties to the ICC have waived the immunities of their officials (whether personal or functional)⁸⁸ for crimes enshrined in the ICC Statute in proceedings before the ICC or national courts of the States Parties⁸⁹. The waiver of personal immunity in relation to crimes under the ICC Statute according to some is to be interpreted to have an effect not only in relation to States Parties and the ICC but also between the State Parties⁹⁰.

⁸⁶ Schabas (n 84) 446.

⁸⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 11–12.

⁸⁸ ICC Statute (n 85) art 27(1).

⁸⁹ *ibid* Preamble states that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’; Danesh Sarooshi, ‘The Statute of the International Criminal Court’ (1999) 48 ICLQ 387, 395; Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity’ (2003) 7 Max Planck Yrbk UN L 591, 596.

⁹⁰ Otto Triffterer, ‘Article 27’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Beck/Hart 2008) 1607; Camilla Lind, ‘Commentary to the Rome Statute: Article 27’ (*Commentary Rome Statute Part 3*) <<https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>> accessed 8 August 2016; Paola Gaeta, ‘Official Capacity and

The complete waiver of immunities under Article 27 does not apply to officials of non-States Parties because States cannot revoke the immunities of officials of non-States Parties⁹¹. This position is in line with the fact that the application of rules of immunities of non-States Parties' officials by the States Parties is governed by international law and is primarily derived from customary law rather than the ICC Statute. This is justified by Article 34 of the Vienna Convention on the Law of Treaties (VCLT), which holds that contracting States cannot create obligations for States that are not party to a Convention⁹². Simply put, officials of non-States Parties *may* still enjoy personal immunity in international law, because the State Parties to the Rome Statute cannot revoke immunities of officials of non-States Parties⁹³.

Having said that, personal immunities may not necessarily be applicable in proceedings before the ICC, as under its Statute, the immunities of officials have been completely revoked⁹⁴; that is when the ICC has jurisdiction over an alleged offender⁹⁵. Most States are party to the ICC Statute⁹⁶, and the result of the provisions on jurisdiction and immunity of officials⁹⁷ entails that the non-recognition of personal immunities of non-States Parties' officials in two situations: One is when States Parties' officials have committed crimes (under the ICC Statute) in a State Party⁹⁸ while the other is when there is a referral by the UNSC which concerns

Immunities' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 998.

⁹¹ Schabas (n 84) 450.

⁹² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁹³ Schabas (n 84) 450; Lind (n 90); Claus Kreb and Bruce Broomhall, 'Implementing Cooperation Duties Under the Rome Statute-, a Comparative Synthesis' in Claus Kreb and others (eds), *The Rome Statute and Domestic*, vol II (Nomos Verlagsgesellschaft mbH & Co KG 2006) 544–77.

⁹⁴ ICC Statute (n 85) art 27(2); Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 JICJ 315, 323.

⁹⁵ ICC Statute (n 85) arts 12-13 and 27; M Cherif Bassiouni, *The Legislative History of the International Criminal Court*, vol 1 (Transnational Publishers 2005) 145; Triffterer (n 90) 792.

⁹⁶ 'The State Parties to the Rome Statute' (*The International Criminal Court*, 23 August 2016) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> 124 countries are State Parties to the Rome Statute.

⁹⁷ ICC Statute (n 85) arts 12(2)(b) and 13.

⁹⁸ *ibid*; Also see Chapter 3 for a more detailed discussion on art 12.

officials of non-States Parties⁹⁹.

The interpretation that holds that Article 27 applies to non-States Parties when the ICC has jurisdiction is supported by some domestic instruments implementing the ICC Statute. Some domestic instruments have not excluded the provisions of their implementing instruments from non-States Parties' officials.¹⁰⁰ As discussed, this may be inconsistent with Article 34 of the VCLT. However, if a rule has developed in customary law to recognise an exception to personal immunity of officials for the commission of crimes under the ICC Statute in the territory of other States, then States' non-recognition of personal immunity of officials will not infringe their obligations under Article 34.

Moreover, the drafting history of the ICC does not rule out the application of Article 27 to officials of non-States Parties¹⁰¹. One earlier proposed version of Article 27 by the Preparatory Committee on the Establishment of an International Criminal Court excluded the application of rules of immunity in the internal law of States and international conventions and treaties. If this language had been adopted in the ICC Statute¹⁰², it would have essentially limited the operation of Article 27 with respect to customary rules on immunity.

Put differently, the earlier proposed version would have obliged the ICC in its proceedings against officials to take into account the rules of customary international law in relation to both the officials of States Parties and non-States Parties. In the end, the second proposal put forward by the Preparatory Committee, which excluded the application of rules of immunity whether on the basis of international law or national law of States¹⁰³, was

⁹⁹ *ibid*, art 13(b).

¹⁰⁰ South Africa: Implementation of the Rome Statute of the International Criminal Court Act 2002, Act No 27 ss 4(2)(a)(b) and 3(c); Canada: Crimes Against Humanity and War Crimes Act (SC 2000, c 24).

¹⁰¹ M Cherif Bassiouni, *The Legislative History of the International Criminal Court*, vol 2 (Transnational Publishers 2005) 208–10.

¹⁰² Preparatory Committee on the Establishment of an International Criminal Court, 'General Principles of Criminal Law' (26 August 1996) A/AC.249/CRP.13, 8.

¹⁰³ *ibid*, 8.

adopted¹⁰⁴ and formed the final text of the ICC Statute.

However, some commenters have relied on the Agreement Between the UN and the ICC (UNICC) and specifically refer to its provision on the immunity of UN personnel (Article 19)¹⁰⁵ to conclude that Article 27 does not rebut the immunity of non-States Parties officials.¹⁰⁶ Under Article 19 of the UNICC, the UN has waived the immunities of officials arising from the Convention on Privileges and Immunities of the United Nations and relevant rules of international law.¹⁰⁷ This argument follows that if immunities had been waived by Article 27, the inclusion of Article 19 in the UNICC would have been unnecessary¹⁰⁸.

That said, the inclusion of Article 19 in the UNICC can be explained by Article 98 of the ICC Statute. Article 98 (1) obliges the ICC not to proceed with a request for surrender or assistance if it would require the requested State to act inconsistently with its obligations under international law with respect to the rules of State and diplomatic immunity¹⁰⁹. Article 98(2) requires the ICC not to proceed with a request for surrender if it would require the requested State to act inconsistently with its obligations under its international agreements¹¹⁰.

Hence, the inclusion of Article 19 in the UNICC precludes the requested State to rely on its international obligations under customary international law or international agreements (ie Convention on Privileges and Immunities of the United Nations) to withhold cooperation

¹⁰⁴ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Draft Report of the Drafting Committee to the Committee of the Whole: General Principles of Criminal Law' (14 July 1998) A/CONF.183/C.1/L.65, art 24; UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Draft Statute of the International Criminal Court: General Principles of Criminal Law' (16 July 1998) A/CONF.183/C.1/L.65/Add.3, art 24; UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Drafting Committee: Text Adopted on the Second Reading' (27 July 1998) A/CONF.183/DC/R.35, art 24.

¹⁰⁵ UNGA, Relationship Agreement Between the United Nations and the International Criminal Court (20 August 2004) A/58/874.

¹⁰⁶ Schabas (n 84) 450–51.

¹⁰⁷ UNICC (n 105).

¹⁰⁸ Schabas (n 84) 450–51.

¹⁰⁹ ICC Statute (n 85) art 98(1).

¹¹⁰ *ibid* art 98(2).

with the ICC. Article 19 of the UNICC does not modify the operation of Article 27 or Articles 12-13, which concern the exercise of jurisdiction by the ICC. More precisely stated, had Article 19 not been included in the UNICC, the ICC could still have exercised jurisdiction over the official concerned but may have faced legal restrictions in securing assistance from States, as ICC State Parties could have invoked Article 98 to refuse to cooperate with the ICC.

Additionally, given that the UNSC resolutions cannot change the rules of immunity in the ICC Statute¹¹¹, if the position that Article 27 only applies to officials of States Parties is adopted, then referrals by the UNSC concerning prosecution of high-ranking officials would be thwarted. Equally, the UNSC acting under Chapter VII by invoking Article 16 of the ICC¹¹² -which defers prosecutions of the ICC for a period of 12 months¹¹³, has granted immunity to individuals (including officials of non-States Parties) who are involved in peace operations authorised by the UNSC. Deferral of prosecutions would not have been necessary had Article 27 of the ICC Statute not removed immunities of officials of non-States Parties.

In similar fashion, the facts arising from the issuance of an arrest warrant for an incumbent head of State by the ICC¹¹⁴ pursuant to a UNSC resolution¹¹⁵ further reveal that the ICC Statute revokes immunities of officials, including officials of non-States Parties. The ICC's Pre-Trial Chamber in the case of *Al Bashir*, which concerned the incumbent president of Sudan, unequivocally held that immunities of officials are not applicable once the jurisdiction of the ICC is established.¹¹⁶ The Pre-Trial Chamber stated that rules of personal immunity are not applicable in ICC proceedings; that there is no lacuna in this regard in its

¹¹¹ Gaeta (n 94) 323–25.

¹¹² ICC Statute (n 85).

¹¹³ UNSC Res 1422 (2000) S/RES/1422.

¹¹⁴ *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Arrest Warrant) ICC-02/05-01/09, P-T Ch I (4 March 2009); *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Second Warrant of Arrest) ICC-02/05-01/09, P-T Ch I (12 July 2010).

¹¹⁵ UNSC Res 1593 (2005) S/RES/1593.

¹¹⁶ *The Prosecutor v Omar Al Bashir (Warrant of Arrest)* (n 114) [42–5].

Statute¹¹⁷ and that the prosecution based on a referral by the UNSC under Article 13(b) of the ICC Statute takes place within the framework of the ICC Statute¹¹⁸.

The Pre-Trial Chamber did not consider the immunities enjoyed by officials under the customary international law when considering the applicable rules on immunity. Nonetheless, any request for cooperation or surrender by the ICC which concerns officials of a non-State Party may be inconsistent with the ICC's obligations under Article 98¹¹⁹ since the ICC has to apply the immunities of officials under the customary international law when requesting the assistance of a State Party¹²⁰.

Hypothetically, the ICC can prosecute a non-State Party official who enjoys personal immunity, if a State chooses to cooperate with the ICC voluntarily, and that State surrenders the offender to the ICC. In any event, the ICC is the arbiter of the application of Article 98¹²¹ and could determine that a request from a State Party to surrender a non-State Party official enjoying personal immunity is not inconsistent with its obligations under Article 98.

The referral of the situation in Sudan by the UNSC and the issuance of arrest warrants by the ICC for the sitting head of State of Sudan (Al-Bashir) instigated the AU to make numerous unsuccessful attempts against the inapplicability of personal immunity of high-ranking officials for crimes under the ICC's Statute. First, the AU attempted to persuade its members to refuse to cooperate with the ICC and take a unified stance against the arrest warrant¹²². Secondly, the AU attempted to persuade the UNSC to defer the situation in Sudan

¹¹⁷ *ibid* 44; ICC Statute (n 85) arts 1 and 21; Schabas (n 84) 451.

¹¹⁸ *The Prosecutor v Omar Al Bashir (Warrant of Arrest)* (n 114) [43–5].

¹¹⁹ ICC Statute (n 85).

¹²⁰ *ibid* art 98; Gaeta (n 94) 323–328.

¹²¹ Schabas (n 84) 1039; *The Prosecutor v Omar Al Bashir (Warrant of Arrest)* (n 114) for instance, the Pre-Trial Chamber of the ICC did not consider art 98 when considering the immunity of Sudan's head of State; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 JICJ 333, 337.

¹²² Kurt Mills, "'Bashir Is Dividing Us': Africa and the International Criminal Court' (2012) 34 HumRtsQ 404, 425–26: Some African States have expressed their discontent with the African Union's position regarding the arrest warrant, which include South Africa, Uganda, Chad, Kenya, Benin and Botswana.

by utilising its powers under Article 16 of the ICC Statute¹²³. However, the AU did not expect to prevent the prosecution of the incumbent president of Sudan and mainly hoped to defer the prosecution of Al Bashir as the main objective of securing peace in Sudan, as this was deemed necessary by the AU¹²⁴.

Thirdly, the AU sought to modify Article 16 of the ICC to permit UN General Assembly (UNGA) to defer ICC prosecution for up to 12 months.¹²⁵ The modification was pursued to allow the AU to participate in the decision-making processes of the international community which concerned an incumbent head of State in Africa.¹²⁶ Finally, the AU attempted to *clarify* the rules of immunity under the ICC Statute in relation to officials of non-States Parties¹²⁷.

Having failed to achieve its objectives, the AU then adopted a broader policy to make amendments to Articles 16 and 27 of the ICC Statute to allow the UN UNGA to defer prosecutions by the ICC and to exclude the scope of operation of Article 27 from incumbent heads of State¹²⁸. In this regard, acting on the AU's mandate, Kenya formally deposited a request for an amendment to Article 27 of the ICC Statute¹²⁹.

However, there was not a uniform position among AU member States regarding the arrest warrant issued by the ICC against Al-Bashir¹³⁰. As a result, any attempt to modify rules of immunity under Article 27 may not receive the support of all African States in the Assembly

¹²³ Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (3 July 2009) AU Assemb, 13th Ord Sess, AU Doc Assembly/AU/13(XIII) para 9.

¹²⁴ Communiqué of the 175th Meeting of the Peace and Security Council (5 March 2009) AU Peace & Security Council, 175th mtg., AU Doc PSC/PR/Comm(CLXXV) para 4.

¹²⁵ Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) (6 November 2009) AU Doc Min/ICC/legal/Rpt.(II) para 3.

¹²⁶ Mills (n 122) 429–30.

¹²⁷ Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court (n 125) para 4.

¹²⁸ Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court (31 January 2014) Assembly/AU/Dec.493(XXII) para 12(1); Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) (2015) EX.CL/Dec.868(XXVI), para 2(viii).

¹²⁹ Proposal of Amendments by Kenya to the Statute (14 March 2014) C.N.1026.2013.TREATIES-XVIII.10.

¹³⁰ Mills (n 122) 245–47.

of States Parties to the ICC, which comprise of only just under one-quarter of the ICC State Parties¹³¹. In fact, when the Assembly of States Parties of the ICC in 2014 did not consider the amendments proposed by the AU¹³², the AU only expressed its *concern* that the Assembly did not consider their proposed amendments¹³³.

Subsequently, two observations can be proposed with respect to the rules of immunity under the customary law. These observations arise from the application of the rules of immunity under Article 27 of the ICC Statute, concerning officials of non-States Parties for the commission of crimes under the ICC Statute in the territory of a State Party in the absence of a UNSC resolution. First, prosecuting officials of non-States Parties who enjoy personal immunity for crimes committed in the territory of an ICC State Party by the ICC will infringe international law. The ICC will breach customary rules on personal immunity of officials and Article 98 of its Statute, which obliges the ICC to consider the customary rules on State immunity when it requests for assistance from a State Party¹³⁴. Conversely, prosecutions of officials of non-States Parties by the ICC will ultimately lend force to the recognition of an exception to the rules of personal immunity by influencing State practice in that regard.

The recognition of an exception to the rules of personal immunity receives support from the fact that the ICC State Parties have waived the personal immunity of their officials *inter se* for crimes under the ICC Statute whether committed inside or outside their territories.¹³⁵ Moreover, Article 27 can be interpreted to indicate an *implicit* consensus among most States with respect to an exception to the rules of personal immunity of officials for crimes committed in the territory of other States. The contextual interpretation of Articles 12, 13 and 27 supports

¹³¹ 'The State Parties to the Rome Statute' (n 96).

¹³² Assembly/AU/13(XIII) (n 123).

¹³³ Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) (2015) (n 128) para 2(ix) *emphasis added*.

¹³⁴ ICC Statute (n 85) art 98.

¹³⁵ *ibid*: art 12(2)(b) provides that if the offender is a national of an ICC State party, the ICC can exercise jurisdiction over the offender for crimes committed under the ICC Statute.

the implicit consensus among States. Finally, the claim for an exception to rules of personal immunity is supported by the fact that some States have waived the immunity of non-States Parties officials in their domestic instruments implementing the ICC Statute.¹³⁶ That being the case, the shared understanding of States on the rules of personal immunity may change *in respect of the crimes under the ICC Statute committed in the territory of other States by foreign officials enjoying personal immunity*.

Having said that, the operation of Article 98 with respect to the rules of personal immunity in customary international law depends on the jurisdictional basis of the ICC. The operation of Article 98 would be different when the ICC or a State exercises jurisdiction over an official of a non-State Party under a UNSC resolution under Chapter VII¹³⁷. That is in comparison to a situation whereby the ICC or a State Party exercises jurisdiction over an official of a non-State Party when the crime is committed in the territory of an ICC State Party¹³⁸.

There are two main perspectives on the application of customary rules of personal immunity when the UNSC acting under Chapter VII of the UN Charter (UNCH) refers a situation to the ICC¹³⁹. The first viewpoint holds that Article 103 of the UNCH not only applies to international agreements but also to customary international law.¹⁴⁰ In other words, obligations under Article 25 of the UNCH, which obliges States to carry out UNSC resolutions

¹³⁶ Schabas (n 84) 450.

¹³⁷ ICC Statute (n 85) art 13(b).

¹³⁸ *ibid* art 12(2)(a).

¹³⁹ *ibid* art 13(b).

¹⁴⁰ Akande (n 121) 342–48; ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi’ (2006) A/CN.4/L.682 para 345; Claus Kreß and Kimberly Prost, ‘Article 98’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Beck/Hart 2008) 1610–12; Gaeta (n 94) 323: takes the position that art 103 takes priority over other international obligations but differentiates ICC with the ICTR and ICTR with respect to availability of personal immunities.

passed under Chapter VII, take priority over customary rules of immunity¹⁴¹. The second viewpoint maintains that Article 103 of the UNCH only applies to international agreements¹⁴² and accordingly obligations of States under Article 25 of the UNCH cannot take priority over customary rules of immunity.

The prevailing opinion on the operation of Article 103 of the UNCH is that the UNSC resolutions passed under Chapter VII take priority over most rules of international law¹⁴³ including the rules of customary international law¹⁴⁴. This reasoning generally maintains that the powers of the UNSC to pass resolutions under Chapter VII of the UNCH are not unrestricted as they are limited by *jus cogens*.¹⁴⁵ On that basis, a UNSC resolution referring a case to the ICC can either explicitly or implicitly¹⁴⁶ revoke the personal immunity of an official of a non-State Parties both for the proceedings before the ICC and States.

In the legal literature, there is support for the idea that personal immunities are not applicable in proceedings of international criminal tribunals¹⁴⁷ by generally relying on the judgments of international criminal tribunals. In this respect, the second perspective rather than

¹⁴¹ Akande (n 121) 342–48; ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 140) para 345; Kreß and Prost (n 140) 1610–12; Gaeta (n 94) 323: takes the position that art 103 takes priority over other international obligations but differentiates ICC with the ICTR and ICTR with respect to availability of personal immunities.

¹⁴² Asad G Kiyani, ‘*Al-Bashir & the ICC: The Problem of Head of State Immunity*’ (2013) 12 Chinese JIL 467, 478.

¹⁴³ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures) [1992] ICJ Rep 3 [39–40]; Marko Divac Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’ (2005) 16 EJIL 879, 884–86; UN, Charter of the United Nations, 24 October 1945, 1 UNTS XVI 1945 arts 24(1) and 103; ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 140) para 345.

¹⁴⁴ Akande (n 121) 348.

¹⁴⁵ Alexander Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’ (2005) 16 EJIL 59, 59; *Prosecutor v Dusko Tadic A/K/A ‘Dule’* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1 (2 October 1995): ‘neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)’.

¹⁴⁶ Kreß and Prost (n 140) 1610–12.

¹⁴⁷ *ibid*; Gaeta (n 94) 324–25.

relying on the status of a tribunal as an international tribunal per se emphasises the mandate granted by the international community, which can clarify the legal obligations under international law with respect to proceedings of international tribunals.

From this perspective, the inapplicability of the customary rules of personal immunity in international criminal tribunals can be justified by the mandate granted by the international community to the international tribunals to prosecute officials enjoying personal immunity and the binding nature of the UNSC resolutions¹⁴⁸. The Appeals Chamber of the Special Court for Sierra Leone stated that personal immunities are not available in tribunals which are not organs of a State but derive their *mandate from the international community*¹⁴⁹. This could be expounded to refer to the mandate granted by the majority of the States to the UNSC - powers under Chapter VII of the UNCH and mandate granted to the ICC by the majority of States to the ICC -, which finds support in the ICJ's judgment in *Arrest Warrant*. The ICJ with respect to personal immunity of high-ranking officials in *Arrest Warrant* stated that,

“[these officials] may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the [ICTY], and the [ICTR], established pursuant to Security Council resolutions under Chapter VII of the [UN] Charter, and the future [ICC] created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural ... shall not bar the Court from exercising its jurisdiction over such a person.”¹⁵⁰

Nevertheless, irrespective of the position adopted, the ICC can still exercise jurisdiction over the official enjoying personal immunity considering the referral procedures granted to the UNSC and inapplicability of immunity of officials under the ICC Statute. However, if Article 103 is only applicable to international agreements, then it would be unlawful under customary

¹⁴⁸ UNCH (n 143) art 25 (‘Members of the United Nations agree to accept and carry out the decisions of the Security Council...’).

¹⁴⁹ *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction) SCSL-2003-01-I, App Ch (31 May 2004) [51] emphasis added.

¹⁵⁰ *Arrest Warrant* (n 31) [61].

international law for States to surrender an official of a non-State Party who enjoys personal immunity to the ICC pursuant to a referral by the UNSC. Moreover, the ICC's exercise of jurisdiction may also be unlawful under customary law, and the ICC may breach its obligations under Article 98 of the ICC Statute if it seeks assistance from State Parties.

On the other hand, if the operation of Article 103 entails that UNSC resolutions passed under Chapter VII take priority over the rules of customary international law, then the ICC would not infringe its obligation under Article 98 or customary rules on personal immunity if it requests extradition of an official from ICC State Parties. This is equally applicable to States' obligations under the customary international law. Accordingly, the application of the rules of personal immunity of non-States Parties' officials depends on the jurisdictional basis of the ICC. Application of personal immunity of officials would be different under Article 98 and customary law if the viewpoint that Article 103 of the UNCH supersedes customary rules is adopted.

Finally, there is also State practice that an exception to immunity *ratione personae* in respect of terrorist acts may be emerging. The US and Canada recognise the terrorism exception to immunity, which applies to both officials and States.¹⁵¹ In *Flatow v the Islamic Republic of Iran*, the Court held that the terrorism exception overrides the common law doctrine of the head of State immunity and that the defence of the head of State immunity is not available under 28 USC s 1605.¹⁵² This section also maintains that, while under current customary law there is no exception to personal immunity, and that such an exception

¹⁵¹ Canada: State Immunity Act (n 45) ss 2(a), 2(1) and 6(1)-(2); Canada: Justice for Victims of Terrorism Act (n 43); 28 USC 1605a (n 42) s 1605 a(1); 28 USC 1603 - Definitions s 1603 (a)-(b).

¹⁵² *Flatow v Islamic Republic of Iran*, 999 F Supp 1 (DC 1998) 999; *Edward Tracy v The Iranian Ministry of Information and Security* [2014] ONSC, CV-14-10403-00CL 1696: Ontario's Superior Court of Justice upheld a motion to enforce a judgment against Iran and two of its organs in the US District Court of Columbia on the basis of the Justice for Victims of Terrorism Act (s. 4[5]) - the Iranian Ministry of Information and Security and the Iranian Revolutionary Guard Corp; *Steen v Islamic Republic of Iran*, 2013 ONCA 30, 114 Or 3d 206 (2013): this case had similar facts to the Tracy v Iran case.

specifically with regard to international crimes may develop in international law.

3.3. Personal Immunity of High-Ranking Officials Involved in Ongoing Commission of International Crimes

This section considers whether a State which exercises adjudicative and enforcement jurisdiction over a high-ranking foreign official for international crimes committed abroad on non-nationals infringes its obligations towards the State whose officials have been the subject of such proceedings. It has already been contended that for a determination of the rules of jurisdiction, the rules of immunity should be considered. For the purposes of adjudicative and enforcement jurisdiction, it is assumed that the high-ranking official is present on the territory of the forum State and that violations of international crimes have been formally recognised by an international body. This section proceeds on the basis that a State has responsibility under international law to give effect to the personal immunity of officials under international law, even if such actions or omissions amount to violations of international crimes. It is contended that a State can, under international law, justify such non-compliance with its international obligations in certain factual circumstances on the basis of the plea of ‘necessity’ in international law. This section argues that States can reject pleas of personal immunity on the basis of the plea of necessity in international law in certain circumstances.

The defence of necessity is provided in Article 25 of Draft Articles on Responsibility of States for Internationally Wrongful Acts while the ICJ in *Gabcikovo-Nagymaros Project* stated that the conditions of the invocation of necessity as articulated in Article 25 reflect customary international law.¹⁵³ Under Article 25 a State may invoke necessity for the commission of a wrongful act, if that act is the only way to safeguard an *essential interest*

¹⁵³ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] 1CJ Rep 7 [51–52].

against a grave and *imminent peril*.¹⁵⁴ The wrongful act should not ‘seriously impair an *essential interest* or the *interests* of States towards which the obligation exists, or of the international community as a whole’.¹⁵⁵ Boed had argued that the concept of necessity should reflect a balancing of the interests of the community of States rather than merely weighing the specific, inconsistent, interests of the two States.¹⁵⁶ This was proposed as a recommendation on the basis of the ILC’s proposed Draft Articles in 1997, which did not include the interests of the international community within its definition of the plea of necessity.¹⁵⁷

In the Commentary to Article 25, the ILC explained that the plea of necessity could arise when there is a grave danger to the essential interests of the State or of the international community.¹⁵⁸ The ILC explained that the plea of necessity to invoke a commission of a wrongful act ‘arises where there is an irreconcilable *conflict* between an essential interest on the one hand and an obligation of the State invoking necessity on the other’.¹⁵⁹ The conflicting interests could be the interests of the international community on the one hand (protecting the non-commission of international crimes) and the interest of the foreign State to have the personal immunity of its officials upheld on the other.

The ILC, on the first condition (safeguarding an essential interest from a grave and imminent peril) noted that the ‘extent to which a given interest is “essential” depends on all the circumstances, and cannot be prejudged’, but that it ‘extends to particular interests of the State and its people, as well as of the international community as a whole’.¹⁶⁰ With regards to the

¹⁵⁴ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) Supplement No 10, A/56/10, ILC Yearbook, 2001, vol II, Part Two, emphasis added.

¹⁵⁵ *ibid*, emphasis added.

¹⁵⁶ Roman Boed, ‘State of Necessity as a Justification for Internationally Wrongful Conduct’ (2000) 3 *YaleHumRts& DevLJ* 1, 4.

¹⁵⁷ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) (n 154) 239 art 33: art 33 was later modified as discussed above (art 25).

¹⁵⁸ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) (n 154) commentary to art 25 para 2.

¹⁵⁹ *ibid*, emphasis added.

¹⁶⁰ *ibid* 85 para. 15.

definition of “imminent”, the ICJ in *Gabcikovo-Nagymaros Project* stated ‘that a “peril” appearing in the long term might be held to be imminent as soon as it is established, at the relevant point in time, that the realisation of the peril, however far off it might be, is not thereby any less certain or inevitable’.¹⁶¹ The ICJ further noted that the ‘word “peril” certainly evokes the idea of “risk”: that is precisely what distinguishes “peril” from material damage’.¹⁶² The interest relied upon must outweigh other considerations, not only from the perspective of the State invoking the plea of necessity, ‘but on a reasonable assessment of the competing interests, whether these are individual or collective’.¹⁶³

The interests of the State which invoke the defence of necessity, would essentially be interests of the international community (ie international crimes), and would be against the interests of the other State, which also form part of the interests of the international community (ie the rules of immunity as part of customary international law representing the interests of the international community, which could be based on the accumulation of self-interest of States or on the legitimacy of norms). On that basis, a State could consider that a ‘peril’, which evokes the idea of risk, would be the likelihood of the commission of certain acts by officials of a State if the perpetrators remain unconstrained. Accordingly, based on the ICJ’s interpretation, it is sufficient that such risks are foreseeable and are highly probable rather than merely a possibility.

This thesis has already argued that the interests of the community of States include the rule of customary international law. It has also been argued that crimes developed in customary international law because of their multilateral dimension could be considered as fully internalised norms (ie legitimate norms) but that the multilateral factor is not necessary to

¹⁶¹ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (n 153) [54].

¹⁶² *ibid.*

¹⁶³ *ibid* 46; ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) (n 154) 84, para 17.

determine the legitimacy of a norm. Thus, in terms of the values that the rules of immunity and international crimes protect, one cannot argue that international crimes trump immunity, as international law has not provided a criterion to distinguish rules of customary international law on the basis of their degree of internalisation. Article 25(b) entails that the act, upon which the plea of necessity relies, should not seriously impair an essential interest. It could be argued that the non-recognition of the plea of personal immunity of an official does not seriously impair the essential interests of the State whose official is implicated (or the interests of the international community), as it is only a temporary measure – the right of a foreign State’s official to personal immunity is not disputed.

The legality of the invocation of the plea of necessity depends on whether the factual circumstances of any given case fulfil the criteria of the plea of necessity: there is a grave peril with a real and foreseeable risk of materialising which endangers an essential interest but which does not seriously impair other essential interests (whether arising out of bilateral obligations or obligations *erga omnes*). The balancing of essential interests should be carried out along with other factors (grave peril and imminent threat) on the basis of the factual circumstances but taking into account that such a measure is temporary. For example, in relation to the rules of the personal immunity of officials, the State invoking the defence of necessity argues merely that officials of a foreign State, due to factual circumstances, do not enjoy personal immunity on a temporary basis. In other words, ‘in invoking necessity a State does not assert a right in defence of its violation of the right of another State, but rather asserts that under the circumstances, international law should excuse its conduct’.¹⁶⁴

The case of *Caroline* could be explained on the basis of the plea of necessity. This case arose out of the destruction of a ship called the *Caroline*, used by Canadian rebels in 1837.

¹⁶⁴ Boed (n 156) 7–8.

British armed forces destroyed the ship in the territory of the US.¹⁶⁵ The US Secretary of State (Webster), in a letter written to the British Minister in Washington, stated that the ‘doctrine of non-intervention by one nation with the affairs of others is liable to be essentially impaired if, while Government refrains from interference, interference is still allowed to its subjects, individually or in masses’.¹⁶⁶ The British Minister in Washington replied to Webster by invoking the plea of necessity and noted that the ‘necessity of self-defence and self-preservation’ had been established as ‘Her Majesty’s subjects in Upper Canada had already severely suffered; and they were threatened with still further injury and outrage’.¹⁶⁷ The right to non-intervention or the respect of the sovereignty of the US could be viewed in light of the interests of the British to avoid an imminent peril to their subjects in Upper Canada.

Other cases where States have invoked the plea of necessity include the conservation of the environment and protection of straddling stocks,¹⁶⁸ economic hardship,¹⁶⁹ and the right of military intervention.¹⁷⁰ Thus, the interests of the international community invoked may not necessarily be those institutionalised in international law. However, the interests of the international community in terms of the prevention of international crimes have already been institutionalised in customary international law. Thus, temporary detraction from another essential interest or community interest, ie the personal immunities of officials, could be

¹⁶⁵ Robert Y Jennings, ‘The *Caroline* and *McLeod* Cases’ [1938] AJIL 82, 95: this case involved the issues of self-defence and self-preservation, which were invoked by the British as a defence. McLeod, a British subject (a Canadian deputy sheriff) was arrested in 1840 on a charge of murder and arson in connection with the destruction of a ship. At the trial there was found to be a lack of evidence even to show that McLeod had been present at the destruction of the *Caroline* and was finally acquitted.

¹⁶⁶ *ibid* 85–86: the British invoked self-defence and self-preservation as defence in McLeod case.

¹⁶⁷ *ibid* 85.

¹⁶⁸ ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) (n 154) 82 citing The ‘Torrey Canyon’, Cmnd 3246 (HMSO 1967); *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court) (Judgment) [1998] ICJ Rep 432 [20].

¹⁶⁹ *Société commerciale de Belgique* (Judgment) [1939] PCIJ Series A/B, No 78, p 160 [267–87].

¹⁷⁰ UNSC, Official Records of the Security Council, 15th year (1960) 3–14 July 1960, paras 144, 182 and 192; 877th meeting, 20–21 July 1960, paras 31 and para 142; in 1960 Belgium invoked the plea of necessity to justify its military intervention in the Congo.

justifiable, especially if the official concerned is actively involved in an ongoing violation of an international crime.

In *Arrest Warrant*, the ICJ held that the arrest warrant issued by Belgian authorities for the incumbent foreign minister of the Congo constituted a violation of a legal obligation by Belgium towards the Congo.¹⁷¹ Belgium could have, in that case, invoked the defence of necessity, arguing for the preservation of the interests of the international community in respect of its non-adherence to the rules of immunity if there were still ongoing mass violations of human rights in the Congo under the authority of the incumbent foreign minister of the Congo. This defence would have been dependent on the evidence of violations of human rights in the Congo and the foreseeable risk of such violations in the future, thereby justifying the rebuttal of the personal immunity of the incumbent foreign minister of the Congo.

This is comparable to the *Torrey Canyon* incident, in which the British authorities bombed a Liberian oil tanker which had run aground just outside British territorial waters, in order to burn off the remaining oil on board to avoid an exacerbation of the existing oil leak into the sea.¹⁷² Arguably, the danger of the oil spill did not pose an existential threat to Britain; rather, the spill only threatened one of the State's interests, namely the protection of the marine and coastal environment.¹⁷³ If Belgium in *Arrest Warrant* could have proved a likely and foreseeable peril, Belgium could have, according to the arguments made here, argued the plea of necessity on the basis of the protection of the interests of the international community. International crimes are part of customary international law (and are *erga omnes*) and are arguably more important than the preservation of the environment, at least from a legal perspective, where most international crimes have also achieved the status of peremptory

¹⁷¹ *Arrest Warrant* (n 31).

¹⁷² ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) (n 154) 82.

¹⁷³ Boed (n 156) 11.

norms.

The “imminent” criterion in the plea of necessity may not be satisfied if a State cannot illustrate an imminent threat to the interests of the international community, but if a peril or threat to the interests of the international community is found, a State can refuse pleas of immunity, both *ratione personae* and *ratione materiae*. For instance, when the forum State has evidence that it is highly likely the officials concerned will commit international crimes, this claim is stronger when there is an ongoing commission of international crimes, because, as noted above, the ICJ has stated that the mere possibility of a peril is not sufficient for a plea based on necessity. The British, for instance, justified the 1999 NATO intervention in Kosovo as legal because it was declared a measure to prevent an overwhelming humanitarian catastrophe.¹⁷⁴

4. Procedural vis-à-vis Substantive Rules

This section considers the conflict of norms between international crimes, some of which have gained the status of *jus cogens*, and the rules of immunity. It considers whether a conflict of norms approach is considered a better alternative to explain the interaction between the rules of personal immunity, functional immunity and international crimes. It was argued that international crimes which create a dual responsibility for States and individuals justify rebuking that immunity, as such acts cannot be considered official functions. The rules of functional immunity were also differentiated from the rules of attribution relating to State responsibility and State immunity. In relation to the personal immunities of States and officials, it was shown that a general rule of customary international law has developed, to the effect that States and their high-ranking officials enjoy immunity unless an explicit exception to immunity in international law has developed, or at least been accepted by the foreign State concerned.

¹⁷⁴ Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP 2002) 167; M Weller, ‘The US, Iraq and the Use of Force in a Unipolar World’ (1999) 41 *Survival* 81, 81.

This section begins with a brief introduction to the techniques for the resolution of conflict of norms, before considering procedural and substantive arguments (including peremptory explanations) in relation to the rules of immunity and international crimes. It argues that these techniques cannot fully account for the operation of the rules of immunity vis-à-vis international crimes.

International law as a matrix of values not only endeavours ‘to protect individual human rights, but also runs on the basis of sovereignty and non-interference principles’,¹⁷⁵ which are evident from the laws of immunity, human rights, international criminal law and international humanitarian law.

In their Joint Separate Opinion, Judges Higgins, Kooijmans and Buerghenthal noted that,

on the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference ... [Further,] international law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other.¹⁷⁶

The question here is how this balancing or equilibrium between the rules of international law and their rationales should be conducted so as to properly take into account both State practice and the principles of international law, such as the duty of non-intervention. The ILC has stated that ‘the complexity of modern societies and their proclivity in absorbing conflicting objectives’ has led to ‘the emergence of conflicting rules and overlapping legal regimes at the international level’.¹⁷⁷ On this basis, the ILC noted that, in order to gain coordination at the international level, ‘*increasing attention will have to be given to the*

¹⁷⁵ Huang (n 69) 3.

¹⁷⁶ *Arrest Warrant* (n 31) Separate Opinion of Judges Higgins, Kooijmans and Buerghenthal [75-79].

¹⁷⁷ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 140) para 493.

collision of norms and ... methods and techniques for dealing with such collisions'.¹⁷⁸

Michaels and Paulwelyn have asserted that the problem of conflict of norms is particularly evident between functional sub-systems or branches of international law - trade and environment, finance, human rights, and so on.¹⁷⁹ They have argued that the application of intra-systemic rules of *lex superior*, *lex posterior*, or *lex specialis* and the related quest for the genuine intent of international law's "unitary lawmaker" have proven to be unsatisfactory.¹⁸⁰

Michaels and Paulwelyn have proposed a functional approach as a solution to the conflict of norms in public international law.¹⁸¹ They consider that, in intra-systemic conflicts, first, the focus is on balancing laws (eg intellectual property law versus antitrust law); secondly, the functional approach aims at coherence; thirdly, a functional approach can lead to mixed or compromise solutions.¹⁸² However, they suggest that whilst balancing as a conflict rule may work well within a system, they posit that it does not work well between sub-systems or branches of international law.¹⁸³ This is justified on the grounds that, international trade tribunals and environmental tribunals may each engage in rational balancing, and in the absence of a common, objective standard (available essentially only within a single "system") the 'value judgments involved in balancing are likely to lead to different results, depending on the values or perspectives inherent in the trade system as opposed to the environmental system'.¹⁸⁴

Fischer-Lescano and Teubner advocate a somewhat comparable approach, proposing that a conflict resolution must be based on developing transnational substantive norms which

¹⁷⁸ *ibid.*

¹⁷⁹ Ralf Michaels and Joost Paulwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' (2011) 22 *Duke JComp& Int'l L* 349, 366–67.

¹⁸⁰ *ibid* 367.

¹⁸¹ *ibid* 359–63.

¹⁸² *ibid* 362.

¹⁸³ *ibid* 368.

¹⁸⁴ *ibid.*

look beyond the territorial, organisational and legal spheres of one particular regime or branch.¹⁸⁵ They suggest that substantive norms should be '*ordre public transnational*' which is an orientation towards a global public interest (constitutional rules).¹⁸⁶ In spite of the fact that the rules of immunity and individual responsibility in respect of international crimes may be viewed as separate sets of rules, they have a direct impact on one another's operations. As they are part of the same system (at least judicially), devising a substantive norm such as '*ordre public transnational*' may not be necessary as the interests of the international community can be discerned from the rules of customary international law and their underlying justifications.

Accordingly, balancing as a conflict resolution tool may not necessarily prove to be a useful tool in relation to the rules of immunity and individual criminal responsibility. In such cases, the offenders will either be tried in the ICC or national tribunals. The ICC has its own rules on immunity; thus, it could be considered a self-contained regime, such as international trade or environmental tribunals. Prosecutions in national courts on the basis of universal jurisdiction, however, raise questions of international law as they may give rise to State responsibility in international law for the prosecuting State. It could be argued that the developments of the rules of immunity and individual criminal responsibility have, to some extent, been independent from each other in international law due to the existence of self-contained regimes (such as the ICC and other international tribunals set up by the UNSC). However, it must be noted that national courts (judgments of national courts are the main source of the rules of immunity) when considering a case have to take into account both sets of rules in international law. The decisions of national courts indicate that they have considered both sets of rules even in the absence of a clear delineation of the two sets of norms in

¹⁸⁵ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2014) 156 Michaels and Paulwelyn propose that application of a substantive norm should guide courts in such situations to incorporate the norms of the 'foreign regime'; Gunther Teubner and Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *MichJInt'l L* 999, 1022–23.

¹⁸⁶ Teubner (n 185) 158.

international law, as they are both part of public international law.

Having said that, there is another dimension to the conflict of norms, specifically with regard to international crimes which have gained the status of *jus cogens*, and rules of immunity which have been bifurcated to procedural and substantive rules by some legal authorities. Discussions on the interaction between peremptory norms or international crimes and the rules of immunity fall within the larger discussion on conflict of norms. Notably the ILC, in its discussion on the fragmentation of international law, devoted a section to peremptory norms and other rules of international law.¹⁸⁷

It is argued here that the “superior” status of peremptory norms and the bifurcation of the rules of immunity to personal and substantive categories cannot provide a sound legal justification for the conflicts of international crimes (and peremptory norms) and the rules of immunity. The ICJ in *Germany v Italy* held that the rules of State immunity are *procedural* in nature and cannot be overridden by substantive rules of *jus cogens*.¹⁸⁸ The Court’s decision has significantly influenced legal scholars and national and regional courts’ opinions on this issue.¹⁸⁹ Prior to the judgment of the ICJ, legal authorities were divided on the application of peremptory norms to State immunity: whilst most had rejected this proposition,¹⁹⁰ some had favoured such an approach.¹⁹¹ That said, amongst legal authorities there is still support for the

¹⁸⁷ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (n 140) paras 361–79.

¹⁸⁸ *Jurisdictional Immunities of the State* (n 9) [93].

¹⁸⁹ *Case of Jones and Others v The United Kingdom* (n 10).

¹⁹⁰ *Al-Adsani v Kuwait* (n 10); *Al-Adsani v Government of Kuwait and Others* (n 10); *Al-Adsani v United Kingdom* (n 10) [62]; *Case of Jones and Others v The United Kingdom* (n 10); *Jones v Saudi Arabia* (n 10) see also Lord Bingham [26]; *AA v Germany* (Slovenian Constitutional Court) No IP-13/99, 8 March 2001; *Siderman v Argentina* (n 10) 458; *Grosz v Germany* (Court of Cassation, 3 January 2006) No 04-475040; *Bucheron v Federal Republic of Germany*, Cass 1e civ, Dec 16, 2003, Bull civ 02-45961; *Natoniewski v Germany* (Ref No IV CSK 465/09) 29 October 2010, translated into English in [2010] Polish Yearbook of International Law 299; Hazel QC Fox and Philippa Webb, *The Law of State Immunity* (OUP 2013) 525.

¹⁹¹ *Ferrini v Federal Republic of Germany* (Supreme Court of Cassation) (2004) 128 ILR 659; *Germany v Voiotia* (Supreme Court of Cassation) (2011) 150 ILR 706; *Prefecture of Voiotia v Federal Republic of Germany (Distomo Massacre case)* (Court of Cassation) (2000) 129 ILR 514; *Kalogeropoulou v Greece and Germany* (n 16); *Al-Adsani v United Kingdom* (n 10){1]: the Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto

idea that *jus cogens* could trump the rules of immunity, especially the functional immunity of officials when officials commit international crimes which are carried out in a large-scale and systematic way.¹⁹²

Generally, when national and international courts have granted immunity to States and officials, they have done so on the basis that these norms are procedural in nature. Accordingly, the arguments of legal authorities in this respect can be summarised as follows. First, peremptory norms are also procedural in nature so that they trump the immunity of high-ranking officials and States¹⁹³. Secondly, immunity *ratione materiae* is a substantive rule of international law so it is trumped by *jus cogens* but *jus cogens* cannot trump personal immunities since personal immunities are procedural rules.¹⁹⁴ Thirdly, the immunity *ratione personae* of officials (or States) is *jus cogens*¹⁹⁵ and thus cannot be trumped by *jus cogens*. In the first case, peremptory norms trump both personal and functional immunities, and in the latter cases, peremptory norms only trump functional immunities, as both are considered to be substantive.¹⁹⁶

There are general issues with propositions based on *jus cogens*, which were considered

and Vajic and para 1 of Judge Loucaides stating its agreement with the Joint Dissenting Opinion; *Arrest Warrant* (n 31) [7] Dissenting Opinion of Judge Al-Khasawneh; Andrea Bianchi, 'Immunity Versus Human Rights: The *Pinochet* Case' (1999) 10 EJIL 237, 265; Alebeek (n 36) 49.

¹⁹² *Pinochet (No 3)* (n 19) Lord Hutton 261-64, Lord Hope 242-46, Lord Millet 275-78; Gaeta (n 90) 982; Alberto-Luis Zuppi, 'Immunity v Universal Jurisdiction: The *Yerodia Ndombasi* Decision of the International Court of Justice' (2002) 63 LaLRev 309, 323; Bianchi (n 191) 265; HF van Panhuys, 'In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities' (1964) 13 ICLQ 1193, 1213; Watts (n 72) 82; Alebeek (n 36) 49; Curtis A Bradley and Laurence R Helfer, 'International Law and the US Common Law of Foreign Official Immunity' (2010) 2010 SupCtRev 213, 238.

¹⁹³ Huang (n 69) 5.

¹⁹⁴ Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcolm D Evans (ed), *International Law* (2nd edn, OUP 2006) 397; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 AJIL 407, 414-45.

¹⁹⁵ *Augusto Pinochet Ugarte* (QB Div'l Ct) (1998) 38 ILR 68 Lord Hope 244.

¹⁹⁶ Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 EJIL 853, 853-875, 862, 863, 867; Xiaodong Yang, '*Jus Cogens* and State Immunity' (2006) 3 NZYIL 131, 132.

in Chapter Two.¹⁹⁷ Parlett contends that the trumping argument is contingent on all necessary rules for the enforcement of a *jus cogens* norm also having *jus cogens* status.¹⁹⁸ Alebeek argues that deploying the *jus cogens* argument to trump immunities is problematic because it requires sliding from the *jus cogens* nature of the prohibition of certain conduct to the nature of the rule allowing or requiring enforcement of that prohibition in foreign national courts.¹⁹⁹

Moreover, the arguments above are also problematic from the substantive/procedural distinction perspective. The ILC in its second report implied that both immunities *ratione materiae* and *ratione personae* are procedural in nature.²⁰⁰ Most recent judicial authorities seem to agree that both immunities *ratione personae* and *ratione materiae* are procedural in nature.²⁰¹ Thus, arguments that functional immunities are substantive are subject to the criticism of the bifurcation of rules of immunity into procedural and substantive norms on no legal basis.

The aforementioned arguments have not only led to myriad of solutions to the conflict between international crimes of *jus cogens* status and rules of immunity, but have also arguably fallen short of explaining why *jus cogens* cannot trump State immunity. Further, at a minimum, such explanations perceive an endpoint for the development of international crimes in this regard, not leaving any room for modification of the rules of immunity. In addition, they fall short of explaining the interaction between international crimes which have not achieved the status of *jus cogens* and rules of immunity. Moreover, as these explanations are either based on a substantive/procedural categorisation of rules of immunity and/or *jus cogens* status of

¹⁹⁷ Andreas Zimmermann, 'Sovereign Immunity and Violations of International *Jus Cogens* - Some Critical Remarks' (1994) 6 *MichJInt'l L* 433, 438: the positioning of *jus cogens* in a hierarchical relationship with respect to other rules of general international law; *ibid* 439: the disagreement over norms, which have achieved the status of *jus cogens*; Akande and Shah (n 71) 833–34; Yang (n 196) 136; Parlett (n 25) 50: the legal effects of *jus cogens* outside the law of treaties is contested.

¹⁹⁸ Parlett (n 25) 50.

¹⁹⁹ Alebeek (n 36) 221.

²⁰⁰ ILC, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction' (n 58) para 53; Yang (n 196) 144; Parlett (n 25) 50.

²⁰¹ ILC, 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2008) (n 3) 53–4; *Arrest Warrant* (n 31) [53].

rules of immunity and international crimes, due to their normative nature they cannot give effect to other principles of international law and the relevant State practice.

More generally, the arguments that revolve around the substantive/procedural categorisation of rules of immunity or peremptory norms are subject to the criticism that all these norms are part of general international law and are consequently of the same ranking (hierarchically or in terms of their legal effects). Although the function of rules of immunity is procedural, they are, nonetheless, derived from customary international law. International crimes such as torture, genocide, and crimes against humanity have also developed in customary international law. On that basis, it could be argued that the procedural-based explanation is defective because it incorporates a new hierarchical status among rules of international law, or at least changes the interaction between rules of international law on a spurious legal justification.

It is not contended here that violation of peremptory norms or international crimes should automatically provide access to international courts when, for example, under their statutes, they have no jurisdiction (a procedural rule) or that personal immunity should be overridden. This line of reasoning only exposes the inadequacies of a procedural-based explanation as a conflict resolution technique between the norms of immunity and international crimes or peremptory norms.

The argument here is that the procedural nature of rules of immunity cannot affect the normative arrangements of the rules of international law as both sets of norms have been established in customary international law, ie they represent the interests of the international community (either on the basis of shared interests or on the legitimacy of the norms). In other words, there are three sets of norms which enshrine the interests of the international community: personal immunity; functional immunity; and international crimes – some of which have reached the status of *jus cogens*. Chapter Two argued that customary law could

give rise to rules which are based on the accumulation of the self-interests of States and rules which are also perceived as legitimate. In Chapter Two, it was argued that with regards to crimes which give rise to the dual responsibility of the State and individual in customary law, due to their multilateral dimension, one could infer that the interests they protect are fully internalised norms and perceived as legitimate. It was not argued that the multilateral dimension of a rule was a necessary factor for a rule to be recognised as legitimate. On that basis, one cannot conclude that rules of immunity are either based on the accumulation of the self-interest of States or are norms which are also perceived to be legitimate.

In a somewhat similar fashion, Orakhelashvili considers that the distinction between procedural and substantive norms is not based on consistent conceptual and normative grounds and that all ‘international norms derive from the agreement of States or acceptance by the international community as a whole, and there are neither established criteria nor a recognised agency to split them into such categories’.²⁰² Orakhelashvili considers this distinction as “artificial”, which ‘does not reflect the functions international law actually accords to its various rules, and is instead a product of political and ideological preference to keep particular classes of plaintiffs out of certain jurisdictions’.²⁰³

The procedural status of rules of immunity can only be explained based on the functions of these norms as procedural norms for international and national courts. It is argued that the procedural status of rules of immunity is not based on sources of international law. In other words, the creation of rules of immunity in international law does not bifurcate rules of immunity into procedural or substantive rules. Specifically, universal jurisdiction in international law is ‘a State’s international capacity or competence under international law to

²⁰² Alexander Orakhelashvili, ‘State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong’ (2007) 18 EJIL 955, 968.

²⁰³ Alexander Orakhelashvili, ‘The Classification of International Legal Rules: A Reply to Stefan Talmon’ (2013) 26 LJIL 89, 89.

prosecute and punish for commission of a crime’.²⁰⁴ Jurisdiction in municipal law is ‘whether a certain executive, legislative or judicial organ is competent in a given case under the applicable constitutional or statutory provisions’.²⁰⁵ Accordingly, the operation of universal jurisdiction or any other form of jurisdiction depends on the operation of the domestic laws of States and, specifically with regard to universal jurisdiction, is dependent upon the incorporation of rules of international law in domestic legal systems for most States (excluding States which have adopted a monist approach to the operation of international law in their domestic legal systems).

As the chapter on universal jurisdiction illustrated, a State is entitled to exercise universal jurisdiction on a subsidiarity basis but its actual operation depends on its incorporation into States’ domestic legal instruments. Whether one State has incorporated international law rules on universal jurisdiction in its domestic legal system does not define the ambit of international law on universal jurisdiction. Thus, jurisdiction, which is a procedural rule in a domestic legal system, has a different meaning in relation to the rules of immunity in international law. In international law rules of jurisdiction and immunities are all customary international law or part of general international law.

Furthermore, with regard to international courts, their procedural rules are clearly set out in their statutes (eg rules of jurisdiction). On that basis, any developments and modifications of (procedural) rules of immunity in international law should consider State practice (eg legislation or case law) and the interpretations of international courts of these rules, rather than the interpretation of an international court on its *own* procedural rules (eg relating to jurisdiction or immunity). In other words, proceedings before international courts which

²⁰⁴ Manley O Hudson, ‘Research in International Law Under the Auspices of the Faculty of the Harvard Law School: Jurisdiction with Respect to Crime’ (1935) 29 AJIL 1, 439.

²⁰⁵ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) 4.

directly engage the rules of that court's jurisdiction (such as the ICJ²⁰⁶) or the immunity of States/officials (eg the ICC, ICTY and ICTR) cannot be taken to represent international law on their own. These rules are procedural for these courts but, at the same time, they are part of the larger substantive development of rules of international law as customary international law.

It is thus argued that, to clarify the interaction between the rules of laws of immunity in international law and international crimes, the centre of the focus should be on their development in customary international law, rather than their function as procedural rules of national and international courts. In a similar vein, Orakhelashvili argues that, instead of relying on the artificial distinction between procedural and substantive norms in terms of their interaction with other rules of international law, there should instead be a focus 'on the specific contexts in which particular rules of international law operate', ie how States have designed a specific norm, what framework it forms part of, what particular function it performs as part of the international legal system, and how it relates to other rules.²⁰⁷ From a legal perspective, it was contended that that a general rule of customary international law has developed which provides that States are not allowed to rebut the personal immunity of officials or States unless an explicit exception has been developed in customary international law or is applicable because of the operation of an international treaty.

5. Conclusion

This chapter argued first that there is a distinction between functional immunity and the restrictive immunity of States (Section 2). The recognition of exception to personal immunity should not be confused with the discretion courts exercise in determining official from non-official conduct in respect of functional immunity (Section 2). The practice of national and international courts illustrates that the personal immunity of States and officials has been

²⁰⁶ *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90 [29].

²⁰⁷ Orakhelashvili, 'The Classification of International Legal Rules: A Reply to Stefan Talmon' (n 203) 91.

upheld there is an exception to immunity exists in international law (Sections 2 and 3.1). It was argued that the practice of national courts in this respect is illustrative of the fact that a general rule of customary international law could be said to exist in respect of the personal immunity of States and their officials (Sections 2 and 3.1).

It was argued that the ICC's Statute revokes the immunities of officials when the jurisdiction of the ICC is established, in accordance with the provisions of its Statute (Sections 2 and 3.1). For that reason, it was proposed that the practice of the ICC and its influence on State practice could change the shared understanding of States with respect to international crimes committed by officials enjoying personal immunity in the territory of other States. This is reinforced by the fact that AU's attempts to modify Article 27 of the ICC's Statute was unsuccessful, that the majority of States including most African States have waived the immunity of their officials under the ICC Statute, and that some States have waived the immunities of officials of non-States Parties officials in their domestic legislations intended to incorporate the ICC Statute. Furthermore, the operation of Article 98 is different depending on the jurisdiction basis of the ICC, in other words, the unavailability of personal immunity in cases by the UNSC, is due to the overriding effect of the UNSC Resolutions passed under Chapter VII with respect to the rules of immunity.

This chapter also contends that the substantive and procedural distinction of rules of immunity resembles an artificial construct in respect of their interaction as rules of customary international law with other rules of international law (Section 4). The function of the rules of jurisdiction of international and national courts should not be confused with their status in international law as rules of customary law (Section 4). Their creation and the methods of their interaction with other rules of international law are based on their status as rules of customary law, rather than their substantive or procedural functions (Section 4).

This alternative explanation on the basis of conflict of norms between international

crimes and rules of immunity was considered because there is widespread reliance on the arguments based on *jus cogens*/procedural/substantive as techniques for the resolution of conflict of norms among legal authorities in relation to the interaction between the rules of immunity and international crimes (Section 4). Putting aside the stance of the legal authorities on the issue of the substantive/procedural/*jus cogens* basis of rules of immunity and international crimes, the judgments of national and international courts in relation to the personal immunity of States and officials illustrate that personal immunities have always been upheld unless an explicit exception exists in international law (Sections 2, 3.1 and 4). Thus, reliance upon the substantive/procedural distinction of the rules of immunity is an unnecessary factor in determining the availability of immunity of States and their officials (Section 4).

Accordingly, the proposed criteria in this thesis offer a better explanation in determining the immunity of officials and States in respect of international crimes. It was argued in Chapter Four that functional immunity of a foreign official can be withheld on the basis of individual and State responsibility with respect to international crimes committed abroad. The personal immunity of States and officials can only be withheld if an exception to the personal immunity of officials and States has developed in customary international law or is excepted by other means (eg an international treaty) (Sections 2, 3.1 and 4). This statement should be read with the qualification of the defence of necessity in international law with respect to foreign officials enjoying personal immunity (Section 3.2).

Conclusion

This thesis illustrated that crimes which give rise to the dual responsibility of the State and individual could be created in customary international law by adopting a constructivist approach to the formation of custom. It was argued that custom could be created by binding *usus*, which is determined through the socialisation process in the social structure of the State system. Accordingly, custom could be created when there is a consensus regarding the status of an act as binding *usus* and a rule as custom. On that basis, it identified some crimes which give rise to the dual responsibility of the State and individual in customary law. This thesis identified international crimes as customary rules which can give rise to *erga omnes* obligations because international crimes represent the interests of the international community that are legitimate. It was contended that violations of *erga omnes* obligations create a right for non-injured States to exercise universal jurisdiction subject to certain conditions.

In relation to the rules of jurisdiction, it was contended that States can exercise any form of jurisdiction subject to the duty of non-intervention and rules of immunity. This thesis also posited that the rules of functional immunity are based on discerning private from official conduct, subject to the prohibitive rules of international law. In this context, since functional immunity was argued to be for the benefit of States and their officials, it can only be rebutted if the prohibitive rules address both States and officials (ie international crimes). In relation to personal immunity, it was argued that there is a consensus in the international community regarding the existence of a customary rule which prohibits the lifting of the immunity of incumbent high-ranking officials unless an explicit exception has been created in international law (ie the similarity between the personal immunity of officials and States).

Specifically, on the basis of the findings of this thesis, it can be proposed that States can exercise prescriptive and adjudicative universal jurisdiction (ie investigations and the issuance of non-binding arrest warrants) *in absentia* over officials enjoying functional

immunity for violations of international crimes. States can also exercise adjudicative and enforcement universal jurisdiction for violations of international crimes if the official enjoying functional immunity is present in the territory of the forum State. States can exercise prescriptive and adjudicative (investigation part) universal jurisdiction in respect of officials enjoying personal immunity. States can also exercise adjudicative and enforcement universal jurisdiction if the official enjoying personal immunity is in the territory of the forum State based on the plea of necessity in international law in certain factual circumstances. There is a strong doctrinal claim, on the basis of the protection of the interests of the international community, that universal jurisdiction is also applicable to civil proceedings.

Having said that, since all these modes of exercise of universal jurisdiction are based on the interests of the international community (either through *erga omnes* obligations or the defence of necessity in international law), the procedural legitimacy of the exercise of universal jurisdiction should be taken into account. The most important factor identified was recognition by an international body such as the UNGA or the UNSC of the potential commission of international crimes. A State which is acting as a trustee of the international community and is exercising universal jurisdiction is not acting to pursue self-interests but rather the interests of the international community which are also perceived as legitimate (fully internalised norms, ie international crimes). Thus, it is necessary to consider the recognition of the international community in respect of the potential commission of the crimes.

Chapter One argued that the notion of community is intrinsically intertwined with the notion of obligations, normative convictions and shared interests among States. By adopting a constructivist approach, it was held that, from a legal perspective, the interests of the international community are norms that have been internalised by most States (either to the second or third-degree) and are also institutionalised in international law. The institutionalised norms in international law would be based either on the self-interests of States (second-degree

internalisation) or the legitimacy of the norm (third-degree internalisation). This distinction between institutionalised rules in international law and the level of internalisation of norms is important, as it avoids a misunderstanding that equates the legality of a norm to the end spectrum of the level of internalisation of a norm.

The distinction between rules of international law which have been internalised to the third-degree (ie legitimate norms) and those which have internalised to the second-degree (based on self-interests), is important from a legitimacy perspective of the rules of international law. Legality and legitimacy are related but are not coextensive. In other words, legality does not connote to legitimacy and vice versa. Scholars writing on legitimacy have generally included the legality of a norm as a factor in determining the legitimacy of a norm, as was alluded to in Chapter One. The interests of the international community which are perceived as legitimate by some States or by most States, but are not institutionalised in international law, could influence the development of international law in line with the normative convictions of the norm.

Chapter One further proposed that rationalist theories fail to account for three phenomena in relation to international law. First, they cannot account for compliance with international law that is inexplicable, based only on material factors (eg coercion and sanction). Secondly, they cannot account for the rules of international law which are not wholly based on the self-interests of States. Thirdly, they cannot account for the influence of international law (which is part of the social structure of the State system) on States' actions and interests. The rationalists only consider the construction of structure by agents – ie the generation of the social structure of the State system by States. This belief cannot naturally take into account the influence of international law on States' interests and actions.

The idea that States' interests are socially constructed and guide State behaviour on the basis of a constructivist idea of the mutual constitution of agent and structure, provides a better

alternative to study the creation of rules in international law, as well as a different context by which to view how international law relates to States' interests and the interests of the international community. Accordingly, accepting that States' actions and interests can be influenced by shared understandings in the social structure of the State system illustrates how custom creation that is based on State practice could be produced, and how customary rules relate to the interests of States and the interests of the international community.

Chapter Two applied a constructivist approach to custom creation to determine how international crimes are formed in customary international law and the link between customary rules and the interests of the international community. Custom could be created on the basis of binding *usus* alone when there is a consensus in the international community. The desires or beliefs of States could only be portrayed in the form of actions, and distinguishing between belief and action creates a circular understanding of *opinio juris* and State practice, ie by inferring one from the other. Both binding *usus* and individual customary rules are determined through the discursive practices prevalent in the international community through consensus.

It was also contended that, since custom is based on a form of action (whether viewed as *opinio juris* and State practice or State practice alone), it will comprise the interests of the international community (whether norms are based on the self-interests of States or are perceived as legitimate). The rules of customary international law could be categorised into two groups by adopting a constructivist approach: first, the customary rules which have been internalised by States only to the second-degree (based on self-interests); and secondly, rules which have been fully internalised by States (ie perceived as legitimate). In other words, custom alone cannot differentiate between legitimate norms or norms based on the self-interests of States.

Actions always succeed the beliefs or desires of States. *Opinio juris* in this context is an attempt to capture the desire of States in relation to the binding status of a norm. Since desire

can only be portrayed in the form of action, it is the actions of States which should provide guidance on the creation of new customary rules. Chapter Two also considered practical problems associated with adopting a distinction between *opinio juris* and State actions. For instance, the fact that States generally do not have a separate organ in charge of synchronising State actions in terms of the rules of customary international law, naturally entails that, even within a State, different branches of a government may have different views on a particular customary rule.

In this context, the interpretation of State actions and *opinio juris* would fall into subjectivity based on the values of the interpreter, especially if the individual consent of States is required rather than a consensus approach, as it could lead to data selection, even among the organs of a State. Both the doctrine and practice of the ICJ support the idea that consensus is at the core of custom formation. This was argued on the capacity of custom to bind eventually even persistent objector State, and the fact that the pedigree of the persistent objector rule itself may not be as established as generally believed. This was held to be in line with the ICJ's approach which generally finds the status of a rule as customary international law on the basis of a consensus of States, rather than viewing individual State practices.

This assertion that custom is based on consensus should also be considered in light of the fact that some legal scholars have viewed the source of legal obligations in the social character of inter-State relations¹. Moreover, a constructivist understanding of the social structure of the State system also emphasises the consensus aspect of the creation of mutual expectations within the State system. The shared understanding on binding *usus* or other *indicia* which make rules binding, is generated in social settings involving many States and other State system-level entities, such as international courts and organisations evolving over a long

¹ Franck and Byers; this idea is also in line with Dworkin's views on community and obligation: see Chapter One and Chapter Two

period. In that respect, it is difficult to see how one State alone can resist the system-level culture in the long term.

Treaties and resolutions of international organisations could be considered as binding *usus* and generally also convey a sense of communal consensus on the status of a rule as customary international law. On that basis, Chapter Two argued that international crimes not only include so-called “core crimes”, but may also include crimes such as terrorism, hijacking, kidnapping and other crimes under the conventions which have received near-unanimous recognition by States and establish dual responsibility for States and individuals. The fact that there is a consensus in the international community regarding the status of these crimes in customary law is also supported by the fact that many States have criminalised these acts in their domestic legislation.

The recognition of crimes based on their status in international law as customary rules provides a better alternative than an understanding of international crimes on the basis of non-legal considerations, such as their gravity or one based on factors such as prosecution in international courts. Nonetheless, the gravity of an act and the prosecution of crimes in international courts could expedite the process of its institutionalisation in international law and internalisation by States which have not internalised these norms. Despite the fact that the gravity of an offence may propel actors to internalise a crime more rapidly on the basis of its perceived higher legitimacy, this does not affect the legal consequences of that crime vis-à-vis other crimes which do not enjoy the same gravity in customary international law.

It is the status of crimes in international law which defines their legal consequences, rather than factors shaping their creation in the social structure of the State system (ie their internalisation and their institutionalisation in international law). In spite of the fact that *jus cogens* have a strong claim of high legitimacy (due to their resistance to change) and have generally been associated with the interests of the international community, the concept of *jus*

cogens cannot answer some fundamental questions regarding individual responsibility affirmatively. This is because the source of *jus cogens* remains contentious and there is a lack of consensus on its content.

In other words, one cannot be certain which norms are part of *jus cogens* and, due to uncertainty regarding their source and operation outside the realm of treaty law, it cannot be predicted how *jus cogens* could interact with other customary rules, such as the rules of immunity. Chapter Two maintained that some customary rules could give rise to obligations *erga omnes*. It was proposed that, because they have a multilateral dimension (which is a signature of their internalisation level in the social structure of the State system), international crimes could be infringed by a State without causing injury to any other State. Further, since they have developed in customary international law, this can give rise to obligations *erga omnes*. On that basis, it was submitted that a breach of an obligation *erga omnes* results in a right of non-recognition of *erga omnes* violations by States and also creates a right for non-injured States against the offending State.

Chapter Three argued that the exercise of jurisdiction according to international law should also be subject to prohibitive rules of international law (such as the duty of non-intervention and rules of immunity). Chapter Three rejected both a prohibitive approach to the rules of jurisdiction, which takes into account only rules prohibiting the exercise of jurisdiction, and a permissive approach to the rules of jurisdiction in international law. The prohibitive rules include all prohibitive rules of international law, which in the case of jurisdiction are the duty of non-intervention and rules of immunity. The permissive rules of jurisdiction seek to balance the interests and competing rights of the States involved and thus inherently seek to give effect to the duty of non-intervention in the affairs of other States. The permissive rules are not mandatory but, generally, if States do not abide by these permissive rules, they risk infringing the duty of non-intervention in the affairs of other States. Broadly speaking, the requirement

of the link between the offence or the offender and the forum State – integral in the permissive rules of jurisdiction – seeks to prevent a breach of the duty of non-intervention.

The permissive rules cannot guarantee the non-infringement of prohibitive rules of international law. Accepting the permissive approach to the rules of jurisdiction in effect situates the rules of jurisdiction in a different category vis-à-vis other rules of customary international law. The permissive approach does not provide a sound legal reasoning since other actions of States are governed by the general rule, which provides that States are allowed to do anything unless prohibited by international law. Moreover, the approach proposed in Chapter Three balances the rights of the States involved, rather than emphasising the right of the State wishing to exercise jurisdiction, or the right of the State which would be subject to the exercise of jurisdiction by that State.

The right to exercise universal jurisdiction based on *erga omnes* violations is essentially based on the community interests' rationale. The right arising from *erga omnes* violations for non-injured States - including the right to exercise universal jurisdiction, is not an unrestricted right. The conditions on the right of States to exercise universal jurisdiction arising from the *erga omnes* violations can only be grasped by considering the prohibitive rules of international law (ie the duty of non-intervention). *Erga omnes* violations give rise to a conditional exercise of universal jurisdiction to avoid the breach of the duty of non-intervention. International crimes representing community interests - ie legitimate norms, which give rise to *erga omnes* obligations, can only give rise to a conditional exercise of universal jurisdiction by States. In other words, the duty of non-intervention subject to certain conditions on the exercise of universal jurisdiction would not be breached due to several factors.

First, the duty of non-intervention is owed to foreign States, and international crimes are prohibited both for States and individuals; that duty cannot be breached if the State is in violation of its obligations in that respect. When a State has failed to prevent the commission

of the crime and subsequently fails to prosecute the alleged perpetrators, this would inevitably weaken its claim regarding a breach of the duty of non-intervention. Secondly, the duty of non-intervention should be viewed in light of the community interests that the prohibition of international crimes protects (ie as legitimate norms). Thirdly, the duty of non-intervention should be viewed in the context that most States exercise prescriptive universal jurisdiction in respect of most international crimes.

The first condition which arises from the *erga omnes* obligations is the fact the State with a closer link to the offence or offender not only fails to prevent the crime but also subsequently fails to prosecute the offenders. As has been asserted, international crimes give rise to *erga omnes* obligations and international crimes establish dual responsibility for States and individuals. The responsibility to prevent the commission of the crime and prosecute the offenders was acknowledged to be a condition for the status of a crime in customary law. The subsidiarity inherent in obligations *erga omnes* is supported both by the subsidiarity principle and practice of many States (both prescriptive and adjudicative exercise of universal jurisdiction).

The subsidiarity integral to obligations *erga omnes* prevents a breach of the duty of non-intervention. The second condition was that the exercise of universal jurisdiction by States should take into account procedural legitimacy factors on the basis that a State is acting as a trustee of the international community, protecting the interests of that community. International crimes represent the interests of the international community as legitimate rules (ie fully internalised in the social structure of the State system). It is on this basis that the recognition of the potential commission of a crime by an international organisation or by one of its bodies enhances the claim of the prosecuting State and weakens any claim of a breach of the duty of non-intervention by the State with the closer link to the offence or the offender.

It was submitted that the presence of the accused for the purpose of the exercise of the

adjudicative and enforcement universal jurisdiction establishes a link between the prosecuting State and the accused, and thus prevents the breach of the duty of non-intervention. The conditions of subsidiarity and procedural legitimacy and the presence of the offender for the purposes of the trial prevent the breach of the duty of non-intervention by the forum State. Chapter Three also claimed that, on the basis of community interests (the legitimacy of the norms), the exercise of universal civil jurisdiction by States does not breach the duty of non-intervention. Given that the exercise of adjudicative and enforcement universal jurisdiction in criminal proceedings is subject to the presence of the offender in the territory of the forum State, civil proceedings (trials) should also be subject to a link between the forum State and the offender (eg assets in the forum State or presence in the forum State) for the purpose of the trial, in order to prevent breaching the duty of non-intervention.

This chapter did not propose that the exercise of universal jurisdiction by States does not have deficiencies; rather it proposed that if the exercise of universal jurisdiction by States in line with the proposed conditions takes place, some of the risks involved in the exercise of universal jurisdiction will be reduced. The proposed conditions include the presence of the offender in the territory of the forum State for the purpose of adjudicative and enforcement jurisdiction, the application of the rules of immunity, recognition of amnesties endorsed by the international community and requirement of recognition of the potential commission of crimes by international organisations, institutions and bodies therein.

Chapters Three and Four considered that the existence of universal jurisdiction does not automatically lead to revocation of the immunity of officials, and that the absence of immunity does not lead to the existence of universal jurisdiction. However, the existence of adjudicative and enforcement universal jurisdiction is dependent on the absence of the functional immunity of officials. Rules of jurisdiction precede rules of immunity, and for the ascertainment of rules of jurisdiction, rules of immunity should also be considered. Both rules

of immunity and jurisdiction seek to achieve a balance between the rights of the States involved. Another similarity between the rules of jurisdiction and immunity is the prohibition of the act in international law as an international crime. While the absence of functional immunity in respect of international crimes is solely based on the dual responsibility of the crimes, the existence of the right of universal jurisdiction was argued to be also based on the *erga omnes* character of international crimes (ie legitimate norms).

Chapter Four maintained that functional immunity benefits both the State and its officials; thus, if functional immunity is to be rebutted, the act must have been prohibited both for the State and the individual, either in international law or the domestic law of the forum State if the crime is committed in the latter's territory. Further, it was posited that rules of functional immunity can be determined on the basis of the differentiation between private and official acts and the breach of prohibitive rules of international law. For crimes committed in the territory of the forum State, the prohibitive rule is the duty of non-intervention, ie when the conduct is carried out without the consent of the forum State which is generally prohibited in the domestic law of the forum State.

It was contended that, for acts committed outside the territory of the forum State, such acts are not protected by the rules of functional immunity, since international crimes create dual responsibility in international law. Arguments which are solely based on individual criminal responsibility, or the irrelevance of official capacity, overlook the aspect of functional immunity which is of benefit to the States. On the other hand, the argument which considers functional immunity for the benefit of the State alone was also rejected, on the basis that it assimilates functional immunity with State immunity. Secondly, the practice of national courts suggests that the functional immunity of officials is generally considered when a plea of immunity is raised by the offender, regardless of the intervention of the home State of the offender in the proceeding. This assertion is qualified on the basis that States, as the primary

subject of international law, can through international law waive the functional immunity of their officials in conventional law or customary law.

Chapter Four also argued that functional immunity is not necessarily dependent on the rules of attribution of State responsibility. Rules of attribution cannot give proper weight to the part of the objective of rules of functional immunity which provides protection to officials as individuals. This view is also supported in the legal literature, and by State practice indicating that crimes committed in the territory of the forum State have not attracted functional immunity if those actions had amounted to an infringement of the duty of non-intervention in the affairs of the forum State. That is even when the actions had been conducted under the instruction of the home State of the official and were essentially attributable to the home State of the official. Chapter Four also maintained that reliance on the rules of attribution essentially precludes the possible concurrent responsibility of individuals and States, a view which is supported by some legal authorities.

Moreover, rules of attribution are even more problematic in relation to civil proceedings, creating the incorrect assumption that, since States cannot be criminally responsible, only officials can be held criminally responsible, yet officials enjoy functional immunity in civil proceedings. This is based on the incorrect assumption that civil proceedings lead to the State being implicated. As indicated in Chapter Four, there is no evidence that States have reimbursed their officials for civil proceedings in respect of international crimes or that they have a responsibility to do so. It was also proposed that State practice in relation to the rules of functional immunity in civil proceedings should be viewed in light of the rules of universal jurisdiction. In cases where pleas of functional immunity in civil proceedings have been rejected, had the courts considered the issue of jurisdiction prior to the consideration of immunity, the claims in question could have been rejected on the grounds of lack of jurisdiction as there was no nexus between the offender of the offence and the forum State (ie

the possession of property in the forum State or presence in the territory of the forum State).

Chapter Five argued that there is a distinction between functional immunity and the restrictive immunity of States. The recognition of exceptions to personal immunity of States should not be confused with the discretion courts exercise in determining official from non-official conduct with respect to functional immunity. The practice of national and international courts illustrates that the personal immunity of States and officials has been upheld unless an exception to immunity exists in international law. The practice of national courts in this respect is illustrative of the fact that a general rule of customary international law could be said to exist in respect of the personal immunity of States and their officials.

The ICC's Statute revokes immunities of officials when the jurisdiction of the ICC is established by the provisions of its Statute. For that reason, the practice of the ICC may influence the State practice which may, in turn, change the shared understanding of States on the availability of personal immunity for officials committing crimes in the territory of other States. The absolute immunity of high-ranking officials may change to include an exception for crimes – ie crimes under the ICC Statute, committed in the territory of other States. The following factors reinforce the assertion that an exception to personal immunity of officials may develop in international law. First, the African Union's attempts to modify Article 27 of the ICC's Statute have been unsuccessful. Secondly, the majority of States including most African States have waived the immunity of their officials under the ICC Statute. Finally, some States have waived the immunities of officials of non-ICC State Parties in their domestic legislations intended to incorporate the ICC Statute.

Chapter Five also contended that a substantive and procedural distinction of the rules of immunity, as rules of customary international law, resembles an artificial construct in respect of their interaction with other rules of international law. The operation of the rules of immunity in international and national courts should not be confused with their status in international law

as rules of customary law. Their creation and the methods of their interaction with other rules of international law are based on their status as rules of customary law, rather than their substantive or procedural functions. Putting aside the stance of the legal authorities on the issue of the substantive/procedural/*jus cogens* basis of rules of immunity and international crimes, the judgments of national and international courts in relation to the personal immunity of States and officials illustrate that personal immunities have always been upheld unless an explicit exception exists in international law.

Accordingly, reliance on the substantive/procedural distinction of the rules of immunity was challenged in respect of their capacity to determine the availability of immunity of States and their officials. While this thesis maintained that international crimes are rules which are also perceived as legitimate, it does not conclude that the rules of immunity are based on self-interests or legitimacy. The status of a rule of customary international law cannot be used to differentiate between the level of internalisation of rules; nevertheless, *erga omnes* obligations do contain criteria for identification of some norms perceived as legitimate. On the basis of the findings of Chapter Two, it cannot be concluded that the rules of immunity are obligations *erga omnes*. A rule of customary international law does not necessarily entail different legal consequences whether the rule is perceived as legitimate by States or as a rule based on the self-interests of States.

Accordingly, the proposed criteria in this thesis offer a better explanation in determining the immunity of officials and States in respect of international crimes. The functional immunity of a foreign official can be withheld on the basis of the individual and State responsibility with respect to international crimes committed abroad. The personal immunity of States and officials can only be withheld if an exception to the personal immunity of official and States has developed in customary international law or is excepted by other means (eg an international treaty). This statement should be read with the qualification of the

defence of necessity in international law with respect to foreign officials enjoying personal immunity.

On the basis of the protection of the interests of the international community, States can rebuke the personal immunity of officials who are involved in ongoing violations of international crime and other potential violations that have been recognised as such by an international body such as the UNGA or the UNSC. This withdrawal of the personal immunity of officials is based on the assumption that the official concerned enjoys personal immunity in respect of the crime concerned (eg outside the framework of the ICC). Such non-recognition of personal immunity is not a rejection of the right of the high-ranking official to enjoy personal immunity in respect of that crime; rather, it is a temporary withdrawal of the right to enjoy personal immunity when there is a likelihood of the commission of international crimes and non-recognition of the personal immunity of the official concerned, which could prevent the commission of international crimes.

Appendix

Conventions in Chronological Order:

1949 Geneva Convention (I) Articles 49 (criminalise, prosecute and prevent), Article 50 (defines grave breaches), Article 51 (liability of the State) (195 Parties)

1949 Geneva Convention (II) Articles 50 (criminalise, prosecute and prevent), Article 51 (defines grave breaches), Article 52 (liability of the State) (195 Parties)

1949 Geneva Convention (III) Articles 129 (criminalise, prosecute and prevent), Article 130 (defines grave breaches), Article 131 (liability of the State) (195 Parties)

1949 Geneva Convention (IV) Articles 146 (criminalise, prosecute and prevent), Article 147 (defines grave breaches), Article 148 (liability of the State) (195 Parties)

1971 International Civil Aviation Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Articles 3, 5 (criminalise and punish), Article 10 (adopt measures to prevent the commission of the crime), Article 7 (prosecute) Articles 5 (2) and 7 (universal jurisdiction; requires the presence of the offenders) (188 Parties): Article 5 (2) was amended by 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Article 3 (universal jurisdiction; requires the presence of the offender) (171 Parties)

1973 Convention on Suppression of Apartheid, Articles 4(a) (prevent and criminalise) and Article 4 (b) (prosecute) (108 Parties)

1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973, Articles 2(2) and (3) (criminalise and punish), Article 7(prosecute), Articles 3(2) and 7 (universal jurisdiction; requires the presence of the offender), Article 4 (a) (prevention) (178 Parties)

1977 Protocol I of the Geneva Conventions, Article 85 (1) (prevent, criminalise and punish because the provisions of the Geneva Conventions mentioned above are made applicable to the Protocol) Articles 11 and 85 (2) (expanded the number of grave breaches applicable in international armed conflicts) (173 Parties)

1979 Terrorist Bombing Convention, Articles 5,4 and 6 (criminalise and punish) Article 15(a) (prevention), Article 8(1) (prosecute), Articles 6(4), 7(2) and 8(1) (universal jurisdiction; requires the presence of the offender), Article 3 (states that the Convention does not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, and the alleged offender is found in the territory of that State, and no other State has jurisdiction under Article 6) (168 Parties)

1979 Hostage-Taking Convention, Article 2 and 5 (punish and criminalise), Article 4(a) (prevention), Article 8(1) (prosecute), Articles 5(2) and 8(1) (universal jurisdiction; requires the presence of the offender) (174 Parties)

1985 Torture Convention, Article 2(1) (prevent), Articles 4-5 (criminalise and punish), Articles 5(2) and 7(1) (universal jurisdiction; requires the presence of the offender) (159 Parties)

1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Articles 5-6 (criminalise and punish) Articles 6(4) and 10 (universal jurisdiction; requires the presence of the offender) 13(1)(a) (prevention) (166 Parties)

1999 Financing of Terrorism Convention, Articles 4-7 (criminalise and punish) Article 18(1)(a) (prevention), Article 10(1) (prosecute), Articles 4(7) and 10(1) (universal jurisdiction; requires the presence of the offender), Article 3 (the Convention shall not apply if the offence is committed within a single State and the alleged offender is a national of that State and is present in that State, and no other State has jurisdiction under Article 6) (186 Parties)

2006 Enforced Disappearance Convention, Articles 5, 7(1) and 9 (criminalise and punish), Article 11(4) (prosecute), Articles 4, 9(2) and 11(4) (universal jurisdiction; requires the presence of the offender) (51 Parties and 95 Signatories)

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